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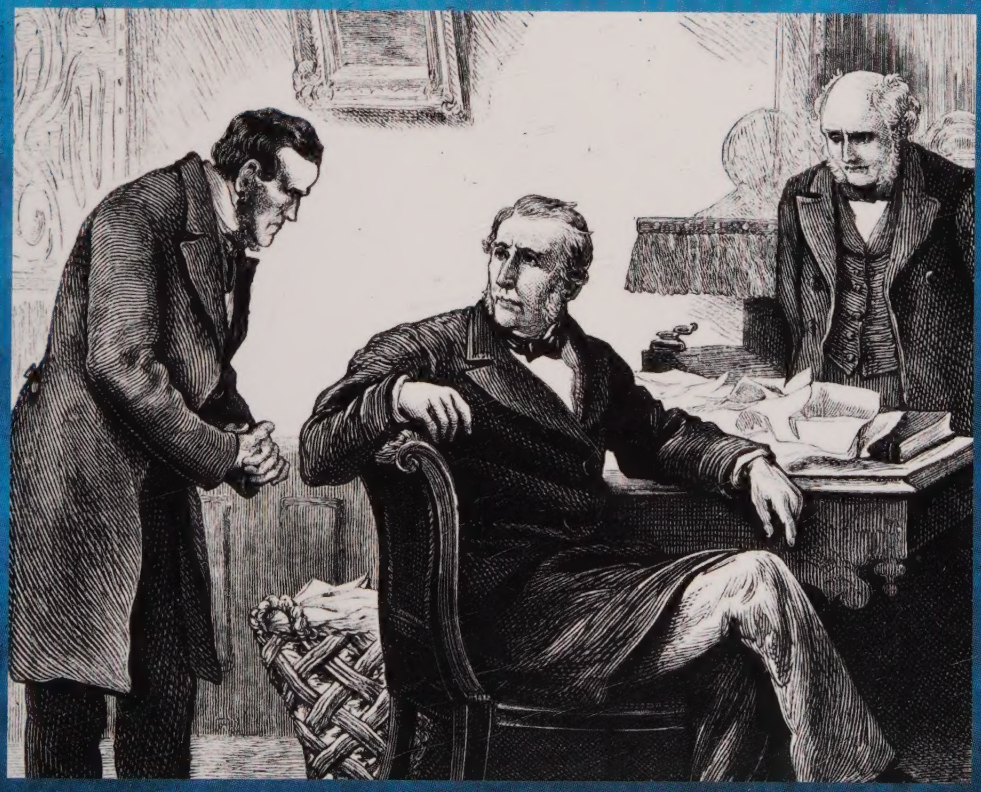
Abraham Caruthers



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History of a lawsuit.
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HISTORY

OF A

LAWSUIT

By ABRAHAM CARUTHERS

Late Professor in the Law School of Cumberland University

FOURTH EDITION

ENLARGED, ANNOTATED AND REVISED

By ANDREW B MARTIN, LL. D.

Professor in the Law School of Cumberland University,
Lebanon, Tennessee

CINCINNATI:
THE W. H. ANDERSON COMPANY
1903

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APR 24 1918

To The

Law Alumni of Cumberland University,

THOSE THAT NOW ARE,

THOSE YET TO BE,

AND TO THE MEMORY OF THOSE WHO ARE DEAD,

THIS VOLUME IS DEDICATED.

A B M.

PREFACE TO THE FOURTH EDITION.

CHANGES affecting the law contained in this volume have made necessary this FOURTH EDITION

The work has been carefully revised and made to conform to the law as it now exists. Some errors found in the former edition have been corrected, some obsolete matter omitted, and some new matter added, including an entire chapter on CRIMINAL PROCEDURE These changes should make the book more acceptable to the student and the practitioner

A. B. M

Cumberland University,
Lebanon, Tennessee, *June* 8, 1893.

PREFACE TO THE THIRD EDITION.

THE last edition of the "History of a Lawsuit" was published in 1860. Several reprints from the old plates have since been issued to supply the demand for the work, but no changes whatever have been made in it. The whole remains precisely as the author left it twenty-seven years ago The law of many of the subjects discussed in it has been greatly changed in that long period; indeed, the subjects in some cases have ceased to exist, or grown obsolete as legal topics. For some years past, there has been an urgent demand for a revised edition. With considerable hesitation, I have undertaken to furnish it. In the work of revision, I have had in view the following objects: 1. To conform the text to existing laws, and bring the citation of authorities down to the present day. 2 To eliminate all obsolete law, and all matter not of general practical benefit 3. To remove all obscurities from the text, arising chiefly from the dense style of the author. 4. To make the book less local in character, and, as far as practicable, equally useful to the profession in all the States. To accomplish these several objects, and to make the matter natural in sequence, as a connected history of a lawsuit, it was necessary, 1. To reconstruct the book in the order of subjects discussed; 2. To rewrite many of the sections; 3. To multiply the illustrations and forms; 4. To add considerable new matter in the discussion of subjects, which in some cases are not mentioned at all, and

in others only incidentally referred to, in the old edition. Briefly, I have endeavored to make the work, in the most practical sense, what its name imports, the history of a lawsuit, serviceable alike to the student and the practitioner as a guide in every phase of legal combat. To what extent I have succeeded in my purpose, must be determined by those who read the book

The system of pleading which it teaches, and which prevails in Tennessee and in some other States, is not common law pleading, neither is it what is commonly designated 'code pleading" It is a modification of the common law, containing few, if any, of the objectionable features of that system But the modification does not go to the extent of *reducing* it to the level of code pleading. The technicalities of the ancient forms are disregarded on the one hand, and the dangerous laxity of the code system avoided on the other It occupies, as I conceive, the middle ground between the two, possessing the excellencies of both, the faults of neither. The differences existing between it and the other two are the occasion of frequent comment and illustration in the book, which should be read to be fully appreciated.

It is confidently asserted that a knowledge of the system of pleading taught in this volume prepares the lawyer for practice under any system prevailing in the United States.

The work was prepared and published by the author for use in the Law School of Cumberland University, in which he was at the time a teacher. It has since been continuously used as a text-book in that school It fills a place which is unoccupied by any other work of which I have any knowledge. It is the author's own conception, and be

is entitled to all the honor. If in my labors I have lessened the regret that he did not survive[1] to do what I have attempted, I will feel that I have sufficiently honored myself, and conferred a benefit on the profession. The author's ability and accuracy of statement fix on me responsibility for all the errors of this edition. For these, I pray judgment with charitable extenuation at the hands of my professional brethren

ANDREW B MARTIN.

1. Judge Caruthers died in 1862

THE HISTORY OF A LAWSUIT.

CHAPTER I.

THE ESTABLISHMENT AND JURISDICTION OF COURTS.

§ 1. When you are employed to bring a suit, the first thing you have to consider is in what court you will bring it. It must be brought in some court having the power to entertain and determine it. This power is called Jurisdiction, which is comprehensively defined to be the authority of a court or judge to entertain an action, petition, or other proceeding, to decide the same, and to carry such decision into execution. This jurisdiction is not the same in all courts, but it has been broken into many parts, and distributed to many courts in unequal proportions, so that the lawyer cannot intelligently choose the tribunal in which to bring the suit without first acquiring a knowledge of the establishment and jurisdiction of courts.

§ 2. The jurisdiction of a court may be original or appellate, and in some instances the same court exercises both jurisdictions. A court is said to have original jurisdiction of a suit when it may be commenced or *originated* in that court. Appellate jurisdiction is the power of a court to adjudicate a case not commenced in it, but transferred to it by appeal, writ of error, *certiorari*, or other process, from another tribunal. The original jurisdiction of a court may be either *exclusive* or *concurrent*. When a proceeding in respect of a certain subject-matter can

only be brought in one court, that court is said to have *exclusive* jurisdiction; when it can be brought in any one of several courts they are said to have *concurrent* jurisdiction When the jurisdiction of a court is limited by the amount or value of the property in litigation, it is called a court of *limited* jurisdiction; when it is not embarrassed by such restrictions it is called a court of *general* jurisdiction. *Territorial* jurisdiction signifies the district or geographical limits within which the court may exercise the jurisdiction or power conferred upon it by law.

§ 3. It would be too great a departure from the design of this volume to dwell at length upon the distribution to the courts of the several kinds of jurisdiction mentioned in the last section. The courts of the several States being established, and their jurisdictional powers fixed to a great extent by the legislatures thereof, has produced many departures from a common system, and minute examinations into the differences thus arising would be impracticable in a work of this character, and confusing to the student A general view of the subject which will give to the beginner a fair comprehension of the judicial department of government, will better serve the end now in view. The remaining sections of this chapter will, therefore, be devoted to a brief account of the establishment and jurisdiction of such State courts as are of most common existence in the several States, and then of the United States courts. And these are assumed to be the justices' courts, the County Court, the Circuit Court, and the Supreme Court.(*a*) These will be noticed in the order named.

(*a*) The Chancery Court, which as an independent court constitutes a part of the judicial system of Tennessee and other States, is omitted This work is devoted to proceedings in courts of law, as distinguished from courts of equitable jurisdiction

1. JUSTICES' COURTS.

§ 4. The justice of the peace is a very ancient officer; authentic records showing the existence of such an officer, called then, however, conservator, warden, or keeper of the peace, are to be found as early as the reign of Edward III of England, in the beginning of the fourteenth century, more than five hundred years ago. He acquired the prefix "*Justice*" in the thirty-fourth year of Edward III, and from that period has borne the more honorable appellation of justice of the peace He was required, under the old English statutes, to be "a good man and lawful, no maintainer of evil or barrator, but of the best reputation in the county" [1]

But, by a statute of somewhat later date, passed in the reign of the successor to Edward III, justices of the peace were required to be "the most sufficient knights, esquires, and gentlemen of the law in the county." [2]

These ancient statutes, in the absence of constitutional or legislative regulation, would be the common law of this country, but the States have abrogated the common law in this particular, and now it is perhaps universally true, that any male person of the age of twenty-one years, who is a citizen of the United States and of the particular State, and has been an inhabitant of the State and particular county and district for the period required by the local regulations, and who has not been specially disqualified by reason of some local law, is eligible to the office of justice of the peace.[3]

They are appointed in some States, and elected in others. Their existence, number, and tenure of office, is

1. 1 Edw. III, 16, 18 Edw III, 2, 34 Edw. III, 1. These old statutes will be found most conveniently collated in Comyn's Digest, under "*Justice of the Peace*"

2. 13 Rich. II, 7.

3. So in Tennessee, Shan. Code, 434, 1069.

in one way or another provided for in every State; so that justice of the peace courts exist as a part of the judicial system in all the States

In Tennessee, the Constitution provides that "the judicial power of this State shall be vested in one Supreme Court, and in such circuit, chancery, and other inferior courts as the legislature shall, from time to time, ordain and establish, and in the judges thereof, *and in the justices of the peace.*"[4] And by another section of the same article of the Constitution, it is provided that there *shall be two* justices of the peace for each civil district in the county, and that the whole number (of districts) in each county *shall not be more than twenty-five* The same section also provides for an additional justice for incorporated towns in the county. The language of these two clauses of the Constitution is both mandatory and restrictive, except as to the additional justices for incorporated towns, that is, the legislature must lay off each county in the State into districts, not exceeding in any county twenty-five in number, and there shall be elected in each one of these districts two justices and no more, and one additional justice for the county town.[5]

Justices of the peace courts, being then provided for in the Constitution of Tennessee, are a *necessary* part of the judicial system of the State, and are in this sense constitutional courts. It is evident that the original object in creating or establishing such courts was the conservation of the peace, "which is the end and foundation of civil society."

The justice's duties as a peace officer were chiefly *ministerial,* and consisted in causing the arrest of offenders and binding them over for trial.[6]

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4. Const State Tenn., art 6, § 1

5. *Contra,* Britton *v* Moody, 2 Coldw 15 But the reasoning in this case is misleading and unsatisfactory, and it is not probable the legal conclusions reached by the court will be applied in new cases.

6. 1 Bl. Comm 349.

Judicial powers, civil and criminal, were afterward added to his duties. But it would be out of place to follow the history of legislation on this subject. A brief summary of his jurisdiction, as it *now* exists, can only here be given. The *subjects* over which the jurisdiction of justices of the peace is exercised are substantially the same in the several States, but the extent to which he may exercise this power over the given subject in many particulars is not uniform, and seems to be controlled by legislative whim. This is strikingly illustrated by the summary given in the foot-note, touching the limitations of jurisdiction as to amount [7]

He has both civil and criminal jurisdiction; and, in treating of these, the rule as it prevails in Tennessee will be taken as the guide

The student will note the differences in the law as here given and that of his own State.

As a justice's court, in point of rank, stands lowest in the judicial system of all the States, it can never exercise appellate jurisdiction, nor in any way supervise the jurisdiction of other courts; and, for the same reason, its jurisdiction must always be *original* This original jurisdiction is sometimes *exclusive,* but in a much larger proportion of cases it is *concurrent.* As has been seen, the jurisdiction of a justice's court is *limited*

A justice of the peace is elected or appointed for a particular district of the county; but, for the exercise of

7 No better illustration of the want of uniformity referred to in the text can be given than to state the rule as it exists in the several States, touching the justice's jurisdiction as to amount on money demands In Tennessee, the limit is fixed at $1,000, in Arkansas, Colorado, Kansas, Massachusetts, Michigan, Nevada, New Jersey, Ohio, Pennsylvania, and West Virginia, at $300, in Missouri, at $250, in Illinois, Indiana, Iowa, Nebraska, New York, North Carolina Texas, Vermont, and Wisconsin, at $200, in Mississippi, at $150, in Alabama, Connecticut, Delaware, Florida, Georgia, Louisiana, Marvland, Minnesota, New Mexico, Rhode Island, South Carolina, and Virginia, at $100; in Maine, at $20; and in New Hampshire, at $13.33.

judicial and ministerial functions, he is deemed a county officer, and may perform any official duty at any point in the county. But he is *territorially* restricted in his jurisdiction by the county lines, he can do no act outside of these.[8]

The civil jurisdiction of the justice of the peace exists in the following cases:[9]

1 Of all suits upon *notes of hand* calling for dollars and cents or specific articles; and upon indorsements of negotiable paper, demand and notice being expressly waived in the indorsement, where the amount claimed does not exceed *one thousand dollars*[10]

2. Of all suits on unsettled accounts, obligations, contracts, or other evidences of debt not embraced under the preceding head, when the amount claimed does not exceed five hundred dollars.[11]

3 Of all cases for the recovery of property, and of all cases of damages, *except libel and slander,* arising from either tort or contract, where the value of the property sued for, or the damages demanded, do not exceed five hundred dollars, and in all cases of libel and slander,

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8 Code (M & V), § 4888, 1 Yerg 177, 1 Yerg 386, 3 Head, 352, 552; 7 Heisk 293

9 The summary of the justice's civil jurisdiction will be found in section 4898, subsections 1–9 and in section 4899 (M & V), Code, from which the statements of the text are taken, except as may be stated in foot notes

10 It is the amount *claimed* in the warrant that determines the question of jurisdiction If the note filed with the warrant or the note with accrued interest exceeds the jurisdiction, the plaintiff may show the true balance to be within the limit, or remitting the excess may demand judgment to the extent of the justice's jurisdiction This, however, would be a bar to the recovery of the sum remitted in any further suit Boyd *v* Hensley, 5 Hayw 258, Code (M & V), § 4937 A justice's judgment for a sum exceeding the amount of his jurisdiction is *void* Saudek *v* Tenn Colonial Co, 1 Baxt. 289, and cases cited

11 Under this provision, it is held that justices have jurisdiction of suits on indorsements, to the extent of five hundred dollars, where demand and notice are not waived Redd *v* Brown, 3 Lea, 615

where the damages claimed do not exceed two hundred and fifty dollars.[12]

4 Of all cases for the recovery of penalties, forfeitures, and fines incurred under the estray laws, and for the recovery of any sums of money under said law, when the amount does not exceed one hundred dollars.

5 Of all cases for the enforcement of mechanics' lien, for any sum within the jurisdiction of the justice

6. Of all equity causes, where the subject-matter does not exceed fifty dollars.[13]

7 Of all cases of forcible entry and detainer

8. Of all cases within his jurisdiction as to amount of motions against defaulting officers; against principals, and in favor of sureties and stayors, and against one surety, and in favor of a cosurety.[14]

9. Of all other cases, where jurisdiction is or may be given expressly by law

Justices of the peace have exclusive original jurisdiction of all debts or demands on contract, where the

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12. The third clause of section 4898 (M & V), Code, embodies section 3 of the Act of March 3, 1875, entitled "An act to increase the jurisdiction of justices of the peace" This act is amendatory, and not repealing in its effect The previous Act of 1865–66, which was embodied in section 4123*a* (T & S), Code, of which the Act of March, 1875, was only amendatory, gave to justices jurisdiction of all *actions* of damages to the extent of $250 This language would necessarily include actions of libel and slander The Act of March 3, 1875, increased the jurisdiction of justices of actions for damages to $500, except as to actions for libel and slander: these were unchanged, and left as they formerly existed under the Act of 1865–66 Justices of the peace, therefore, have jurisdiction of cases of libel and slander where the damages claimed do not exceed $250

13. Code (M & V), § 4899. The Code does not vest justices of the peace with any of the powers of a chancellor, all it undertakes to do is to direct the justice, in cases of $50 or less, to hear and determine them as the merits of the case may demand, without regard to the rigid rules of the common law 4 Lea, 56, 9 Lea, 217, 8 Baxt 85, 3 Head, 344

14 Code (M & V), §§ 4942, 4946 If the fact of suretyship does not appear on the face of the instrument, or the proceedings, a justice of the peace has no jurisdiction of motions in favor of sureties. Cannon *v* Wood, 2 Sneed, 178.

amount sued for is fifty dollars or less. In all other cases their jurisdiction, as far as it extends, is concurrent with that of the Circuit Court.(a)

In considering the power of a justice of the peace, as to violations of the criminal laws, it is well for the reader to keep in mind the distinction between such as are jurisdictional or judicial, and such as are purely ministerial The first consist of those powers vested in him *as a court to try and punish offenders,* the latter relate to his character as a *peace officer,* by the exercise of which he initiates the proceedings by which *offenders are brought to trial and punishment in some other tribunal.*[15]

His jurisdictional powers are alone to be considered in this chapter.

Justices of the peace have only such criminal jurisdiction as is expressly conferred by law[16] In Tennessee his jurisdiction, by express statutory enactment, extends only to cases of misdemeanor, commonly designated "small offenses," where the defendant pleads guilty[17] In such cases, it is the duty of the justice to *hear the evidence,* and fine the offender, according to the aggravation of his offense, not less than two dollars and *not more than fifty dollars,* together with all costs The jurisdiction of the justice depends upon the facts and circumstances of each particular case, and he is required to hear the evidence, that he may correctly determine the grade of the offense; and if from this it shall appear to him that the offense merits a fine exceeding fifty dollars, or imprisonment and fine of any amount, or imprisonment alone, or if the offense disclosed by the evidence is punishable expressly by both fine and imprisonment, then, in either event, the jurisdiction of the justice is at an end,

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(a) § 5002, M. & V

15 An enumeration of the ministerial powers referred to in the text will be found in section 5798 (M & V), Code

16. § 5794, M & V. 17 § 5819, M & V.

or rather is ascertained not to have attached, and his only power is to bind the offender over for trial in a court of competent jurisdiction.[18]

2. COUNTY COURTS.

§ 5. These courts, as they exist in many of the States, are courts of inferior jurisdiction in civil cases, having also a limited criminal jurisdiction, and appellate jurisdiction over justices of the peace. Sometimes combined with these powers are varied duties in the administration of county affairs and business, and in caring for the persons and estates of those coming within legal guardianship.

In other States there are courts, styled Courts of Ordinary, Probate Courts, Orphans Courts, and Surrogate Courts, etc These usually have jurisdiction of the probate of wills, the issuing of letters testamentary or of administration, the settlement of decedent's estates, appointment of guardians, etc.; and in some cases there is added a limited jurisdiction in civil actions and criminal prosecutions. The County Courts of Tennessee are somewhat peculiar in their constitution and powers, in some

18. §§ 5819, 5826, M & V; State *v* Spencer, 10 Humphr 431. Criminal jurisdiction is conferred upon justices of the peace with great caution It will be seen, from the statement of the text, that his jurisdiction *at last* depends upon the will of the offender. The offender, being brought before the justice, must *submit* to the exercise of the jurisdiction by his *plea of guilty*, before the justice has any power to try him, and when the jurisdiction under the plea of guilty attaches, the justice, in the visitation of punishment, is restricted alone to fine, and that in no case can exceed $50 The constitutional provision in Tennessee (§ 14, Declaration of Rights), which provides that no person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment, is not violated by the law which confers upon justices of the peace jurisdiction of misdemeanors, nor does it violate the right to a trial by jury McGinnis *v* State, 9 Humphr 43 But an act of the Tennessee legislature, chapter 153, passed March, 1879, which undertook to confer original *exclusive* jurisdiction on justices, of misdemeanors punishable by fine of not more than $50, was held unconstitutional McGee *v*. State, 2 Lea, 622.

respects differing from each of the courts above mentioned, and in others combining some of the qualities of all of them

The statute establishing County Courts in Tennessee is as follows. A court is established in each county of this State, composed of the magistrates (justices of the peace) of the county, for the dispatch of probate and other business intrusted to it, to be called the County Court.[19]

There is no provision in the Constitution of the State establishing the County Court, yet it is said as such courts were in existence at the adoption of the Constitution, and were not discontinued by that instrument, but by its provisions certain duties were imposed on the "justices of the peace" evidently in their collective capacity, and on the "County Court," it is reasonable to infer, and it is held that the Constitution contemplated the continued existence of such courts, *for the performance of the duties therein imposed,* and in this respect they are deemed constitutional courts, and must continue to exist until they are abrogated by the action of the people in changing the Constitution [20]

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19 § 207, M & V

20 Pope *et al* v Phifer *et al* 3 Heisk 682 There is a conflict of authority in the State as to the *constitutional* character of the County Court In L & N R R Co *v* County Court, 1 Sneed, 636, it is expressly held that "the County Court is the creature of the legislature" * * * "The legislature, being the creator, can certainly shape the creature as it chooses" Both of the above decisions were rendered while the Constitution of 1834 was in force There are, however, no changes made by the Constitution of 1870, now in force, which affect the conclusions reached in either case In Pope *v* Phifer, *supra*, County Courts are held *constitutional* so far as they are required to perform the certain duties imposed on them by the Constitution. These are few in number, and none of them are judicial in character See Const, art 7, §§ 1, 2, art 11, § 17 All its other duties and powers have been imposed by the legislature, and may be taken away by it This would leave to the County Court the performance of the constitutional duties, which, as stated in the sections cited, are the election of one ranger, one coroner, and the right to fill county offices created by the legislature

Each county in the State is by express enactment a corporation, and the justices thereof, in the County Court assembled, are the representatives of the county, and authorized to act for it.[21] Their powers as such representatives are defined by the statutes, and outside of these they can do no act binding on the county

In the exercise of these powers so conferred they become miniature legislatures, and the powers, whether they be called municipal or police, are in fact legislative powers [22]

The laying of a county tax is characterized as a municipal power,[23] and so the power to open roads,[24] and an order to build a courthouse is the exercise of the police power only.[25] These are but illustrations of the many powers of like character conferred upon the County Courts as representatives of the county, and which, although they may be otherwise named, are in their nature legislative [26] But in all cases which involve the rights of individuals, on which the County Courts are authorized to adjudicate, they exercise judicial powers, and without further digression from the subject of this chapter, it remains now to speak of the County Court, as a *court* having and exercising jurisdictional powers

The County Court is not a court of common-law jurisdiction, and, therefore, can only exercise such jurisdictional powers as are expressly given by statute.[27]

The Code of Tennessee provides that the County Court shall have original jurisdiction in the following cases.(*a*)

1 The probate of wills

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21 § 459, M & V

22 Grant *v* Lindsay, 11 Heisk 666

23. 8 Humphr 634

24 8 Humphr 342

25 5 Sneed, 515

26. § 4985 *et seq*, M & V, and other sections of the Code there cited, enumerate many of the provisions referred to

27 Young *v* Shumate, 3 Sneed, 369; Dean *v* Snelling, 2 Heisk. 484

(*a*) See M & V, § 4980, subsecs 1–13.

2. The granting of letters testamentary and of administration, and the repeal and revocation thereof.

3 All controversies in relation to the right of executorship or of administration.

4 The settlement of accounts of executors and administrators.

5. The partition and distribution of the estates of decedents, and for these purposes the power to sell the real and personal property belonging to such estates, if necessary, to make the partition and distribution, or if manifestly for the interest of the party.

6. The settlement of estates; and for this purpose to sell real or personal property belonging thereto, at the instance of the personal representative or the creditors.

This jurisdiction is exclusively in the County Court where the estate, real and personal, is of less value than one thousand dollars In all other cases, without regard to the value or solvency or insolvency of the estate, it is concurrent with the jurisdiction of the Circuit and Chancery Courts.(*b*)

7. The appointment and removal of guardians for minors and persons of unsound mind, and all controversies as to the right of guardianship and the settlement of guardian accounts

8 The allotment of dower and homestead (*c*)

9. The partition of land in kind, or by sale and division of the proceeds (*d*)

(*b*) M & V, §§ 3171, 3172, 3207, 4981. By the terms of section 4980, subsection 6, of M & V Code, the jurisdiction of the County Court, in the sale of lands of decedents, for the payment of debts, is limited to insolvent estates which do not exceed $3,000 in value But sections 3172 and 4981 by necessary implication repeal that limitation, and the jurisdiction is now unlimited See also Connell *v* Walker, 6 Lea, 709, Burgner *v* Burgner, 11 Heisk 729.

(*c*) M & V., § 2944; Rhea *v* Meredith, 6 Lea, 609

(*d*) The County Court has no power, as an incident to the exercise of this jurisdiction, to settle questions of title Dean *v* Snelling, 2 Heisk 484.

10. The changing of names, and the legitimation and adoption of children.

11 The issuance of inquisitions of lunacy or unsoundness of mind.

12. The binding out of apprentices, and all controversies between master and apprentice

13. All *other matters of which jurisdiction* is conferred by law. Under this head it may be stated that the County Court in Tennessee has jurisdiction to foreclose by bill a mortgage or a vendor's lien on land, where the amount involved does not exceed fifty dollars.(*e*)

3. CIRCUIT COURTS.

§ 6. There is to be found in all the States some one court possessing general original jurisdiction, in which civil and criminal cases are tried by judge and jury. These courts are variously named. In some States they are called District Courts; in others, County Courts, etc. In Tennessee, they are called Circuit Courts — so named because the judge who held the court, was required to "go around" from point to point, that is, "ride the circuit," and hold his court at stated times and places in different portions of the territorial division of the country allotted to him The *name* remains, although the judge may have no circuit to ride, and only holds his courts at a single place in his own county

The statute declares the jurisdiction of the Circuit Courts of Tennessee to be as follows:

1. They are courts of general jurisdiction, and the judges thereof shall administer right and justice, according to law, in all cases where the jurisdiction is not conferred upon another tribunal.[28]

(*e*) Shan Code, § 6035.

28. § 4997, M & V The Circuit Court has no equity jurisdiction, except such as is conferred on it by statute Arrington *v.* Gressom, 1 Coldw. 522. See *herein* subd 12.

2. They have exclusive original jurisdiction of all pleas of the State for crimes and misdemeanors, either at common law or by statute, unless otherwise expressly provided [29]

All criminal prosecutions must be in the name of the State. They are often called actions, or suits. "Pleas of the State," which is a quotation from the statute, is an expression which is intended to mean the same thing.

A plea, in its ancient sense, meant an action, or suit. English books on criminal law are often styled "Pleas of the Crown" The crown, being always the prosecutor, the prosecution is the suit, action, or plea of the crown. Most commonly, however, the term "suit," or "action," is applied to a civil action, and the term "plea" to the defense which the defendant makes to the action [30]

3. They have exclusive jurisdiction to try and determine all issues made up to contest the validity of last wills and testaments (*a*)

4 They have exclusive jurisdiction to try and determine all applications, to be restored to citizenship, made by persons who have been rendered infamous by the judgment of any court of the State [31]

5 They have jurisdiction to enter judgments on awards of arbitrators, and to hear and determine agreed cases [32]

6 They have jurisdiction concurrent with justices of

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29 § 4998, M & V This section does not prevent the establishment of special courts of criminal jurisdiction, and a number of such courts now exist in Tennessee

30 "Pleas of the Crown" always denote a criminal prosecution, while the expression "common pleas" relates to civil actions

(*a*) Harrison *v* Guion, 4 Lea, 534 The act of the Tennessee legislature, embodied in section 6109 of Shannon's Code, enlarging the jurisdiction of the Chancery Court, does not have the effect to confer on that court concurrent jurisdiction with the Circuit Court, in the trial of the issue *devisavit vel non*. 5 Pickle, 622; 7 Pickle, 184

31. § 5000, M & V

32. § 5001, M & V.

the peace, to the extent of the jurisdiction of the latter, of all debts and demands on contract *over fifty dollars.*[33]

7. They have concurrent jurisdiction with the County Courts to change the names of persons, to legitimate children, and authorize the adoption of children.[34]

8. They have concurrent jurisdiction with Chancery Courts to grant divorces, to release testamentary and other trustees, to appoint trustees in place of those released or dead, and also to decree, on the petition of trustees appointed by will or otherwise, the sale of property, real or personal.[35]

9 They have concurrent jurisdiction with Chancery and County Courts to allot dower, to make partition and distribution, and, for this purpose, to sell property, real or personal, if necessary, or manifestly to the interest of the parties, and to sell land to pay debts of decedent where the personal assets are insufficient.[36]

10. They have appellate jurisdiction of all suits and actions of whatever nature or description instituted before any inferior jurisdiction, whether brought before them by appeal, *certiorari*, or in any other manner prescribed by law.[37]

11. They are clothed with all the powers of the

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33 § 5002, M & V. The enlargement of the jurisdiction of justices of the peace does not operate to abridge the jurisdiction of Circuit Courts Taylor *v* Pope, 5 Coldw 413 Under this section, 5002, the Circuit Court has concurrent jurisdiction with justices of the peace, without reference to the amount involved, of *all* cases within their jurisdiction, except actions brought for debts or demands due by contract calling for $50 or less An action of replevin for any article of property, no matter of how small a value, may be brought in the Circuit Court. So, an action for any amount of damages

34. § 5003, M. & V.

35. § 5004 (M & V), Code The Circuit Court has no inherent power to appoint trustees Its powers in this respect are derived from statutory enactments, and an appointment not authorized by some statute is void. Watkins *v* Specht, 7 Coldw. 585.

36. § 5005, M & V

37. § 5006, M & V.

Chancery Court to abate nuisances, in an action brought for damages, resulting from a nuisance, upon the finding of a jury that the subject-matter of complaint is a nuisance and judgment entered thereon.[38]

12. Any suit of an equitable nature brought in the Circuit Court, where objection has not been taken by demurrer to the jurisdiction, may be transferred to the Chancery Court of the county or district, or heard and determined by the Circuit Court, upon the principles of a court of equity, with power to order and take all proper accounts, and otherwise to perform the functions of a Chancery Court.[39]

4. SUPREME COURT.

§ 7. The Supreme Court is a court of final resort in the State, and in Tennessee is strictly a constitutional court. The Constitution having, in the first section of article 6, established the court, in the second section of the same article proceeds as follows: "The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the State. The judges shall designate one of their own number who shall preside as chief justice. The concurrence of three of the judges shall, in every case, be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law, *but it may possess such other jurisdiction as is now conferred on the present Supreme Court*.[40]

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38 § 5007, M & V.

39 § 5008, M & V., Sewanee Co. *v.* Best & Co., 3 Head, 702.

40. The clause "but it may possess such other jurisdiction as is now conferred on the present Supreme Court," would seem to be wholly unnecessary, as the jurisdiction of the Supreme Court at that time was identical with that conferred by this section of the Constitution of 1870. See Constitution 1834; Miller *v.* Conlee, 5 Sneed, 432; Memphis *v.* Halsey, 12 Heisk. 210; State *v.* Hall, 6 Baxt. 3.

The jurisdiction of this court, by the express language of the Constitution, is *appellate* only,[41] and it has been decided that the legislature cannot confer original jurisdiction upon it.[42] But this appellate jurisdiction is to be exercised "under such restrictions and regulations as may from time to time be prescribed by law." Under this provision the legislature would have no power to "*restrict*" with the view of defeating the exercise of the appellate powers of the Supreme Court, but only to establish such restrictions and regulations as would at once facilitate the exercise of the power, and prevent the abuse of it. Various regulations of this character have been made, but the discussion of these is reserved for the chapter on the correction of errors, in an after part of this volume.

As necessarily incident to its appellate jurisdiction, the Supreme Court may render judgment upon motions against sheriffs for defaults made in relation to process issuing from it.[43] But it has no jurisdiction to render judgments over on motion against principals in favor of sureties, nor against cosureties.[44] Where the *decree* does not properly embody the *judgment* of the court, the court may rectify it at a subsequent term,[45] but a bill of review will not lie in the Supreme Court to review its decrees.[46] It has the power to adopt and use the means necessary for the exercise of its appellate jurisdiction, as to issue a mandamus to compel the judge of an inferior court to *sign a bill of exceptions*,[47] but it has no jurisdiction to is-

41. 5 Sneed, 432, 574, 12 Heisk 210
42. 2 Coldw 565, State *v* Hall, 6 Baxt 3, 5 Sneed, 432
43. Bank of Tennessee *v.* Cannon, 2 Heisk. 428
44. Waters *v.* Lewis, 9 Yerg. 16; Ward *v* Thompson, 2 Coldw. 565
45 Polk *v* Pledge, 5 Heisk 371
46. Wilson *v.* Wilson, 10 Yerg. 200, Elliott *v.* Cochran, 1 Coldw. 393
47. 8 Lea, 561; 1 Heisk. 783, 3 Coldw 259, 6 Baxt 7, 1 Heisk. 248.

sue a mandamus to compel the judge of an inferior court to hear a cause.[48]

This completes the review of the jurisdiction of State courts. It is necessarily imperfect, and is more a summary of the jurisdiction of the several courts than a discussion of the subject But even as a collection of statutory rules, it may prove valuable for ready reference to laws that cannot be found so conveniently arranged elsewhere It will enable the young lawyer the more readily to determine in what court to bring his suit.

UNITED STATES COURTS

§ 8. Section 1, article 3, of the Federal Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish"

That section, it will be observed, *creates* the Supreme Court of the U ted States, and it is therefore as old as the Constitutio . of the Federal Union Its jurisdiction extends throughout all the States and Territories; and considering its vast duties and powers, it is not remarkable that it should have been called the "greatest court in the civilized world[49] The Constitution establishes but "one Supreme Court," and then in the latter part of the section above quoted gives to the Congress power to establish such inferior courts as it might from time to time deem necessary Accordingly, Congress has established three other courts, one called the District Court, another the Circuit Court, and a third the Circuit Court of Appeals, so that in the judicial system of the United States there are four courts, the lowest in rank being the District Court, the next the Circuit Court, the third the

48 State v Elmore, 6 Coldw 528, 7 Heisk 364

49 See "Jurisdiction of the United States Courts" by Judge Curtis, which is authority for many of the statements made in this chapter on the Federal system of courts

Circuit Court of Appeals, and the highest the Supreme Court.[50]

Before enumerating the jurisdictional powers of these several courts, it is proper to inquire what judicial power resided in the United States, to be by them conferred upon the courts. Previous to the formation of the Union it is assumed that all judicial power resided in the States. The Constitution is a grant of powers from the States to the United States, and among those granted were certain judicial powers, which are enumerated in that instrument.

By section 2 of article 3 of the Constitution it is declared that "the judicial power (of the United States) shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party; to controversies between two or more States, *between a State and citizens of another State*, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and *between a State* or the citizens thereof, *and foreign States, citizens, or subjects.*"

At a very early date after the adoption of the Constitution the Supreme Court held in the case of Chisholm's Executors *v.* The State of Georgia,[51] that the judicial power conferred by the words italicized in the foregoing section of the Constitution extended to suits prosecuted *against* one of the States by citizens of another State, or

50 The territorial courts and the courts of the District of Columbia are omitted from the enumeration of Federal courts They are each peculiar in their establishment and government, and neither can be said strictly to belong to the judicial system of the United States

51. 2 Dall 419

by citizens or subjects of any foreign State. This decision gave such general dissatisfaction, and it was met by such open defiance of judicial authority on the part of the legislature of Georgia, it was deemed expedient to amend the Constitution, and the result was the eleventh amendment, which is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State"

This amendment relieves the State from any liability to a suit by an individual The State may sue the citizen, but the citizen cannot sue the State He is without remedy in the courts for his demands against the State, for relief, he must look to the legislature. The State, by legislative action, may surrender this exemption if there be no constitutional prohibition.

Having determined the extent of judicial power vested in the United States by quoting the words of the grant (the Constitution), we will now attempt to show how this great power has been distributed to the courts of the Federal system, beginning with the highest—

THE SUPREME COURT.

The jurisdiction of this court is both original and appellate. The Constitution has declared what its original jurisdiction shall be, and has confined it to two classes of cases:[52]

1 Those affecting ambassadors, other public ministers, and consuls

2. Those in which a State shall be a party.

Congress cannot confer upon this court original jurisdiction; that is determined by the Constitution — and

52. Art 3, § 2, Const. U. S.

any effort of Congress to extend it beyond the two classes of cases mentioned, would be unconstitutional. This question arose very early, and it was so decided in the case of Marbury *v.* Madison.[53]

The very narrow limits attaching to the original jurisdiction of this great court, make it a tribunal of very infrequent resort in the first instance. No cases of great importance under the first class have arisen, and none are likely to arise. Under the eleventh amendment of the Constitution, it is necessary that, in every case arising under the second class, a State shall be the complaining party This necessarily restricts the number that might otherwise arise. But these cases, when they do occur, generally involve great questions, and vast sums of money. A recent case, The State of Texas *v.* White and others, fairly illustrates the exercise of this class of original jurisdiction by the Supreme Court.[54]

The great importance and power, however, of the Supreme Court is to be found in the exercise of its appellate jurisdiction. The appellate jurisdiction of this court is divisible into two parts, namely 1 That which it exercises over the courts of the several States, and, 2 That which it exercises over the several inferior courts of the United States This jurisdiction, as it relates to the State courts, will be first noticed.

The language of the Constitution upon the subject of the appellate jurisdiction of the Supreme Court is very general and comprehensive.

After enumerating, in the first clause of section 2, article 3, the cases to which the judicial power of the United States shall extend, and then in the first part of the second clause of that section declaring in what ones

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53 1 Cranch, 137

54. State of Texas *v.* White, 7 Wall. 700.

of those cases the original jurisdiction of the Supreme Court shall be exercised, it then proceeds as follows:

"In all the other cases before mentioned (that is, the cases to which the judicial power of the United States extends, and which are not of original jurisdiction), the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It will be seen, upon a careful examination of section 2 and its several clauses referred to, that the Constitution does not in terms grant to the Supreme Court appellate power in reference to the courts of the several States. It is, however, a power necessarily implied, and although it was at an early day seriously questioned, it was long since settled in favor of the exercise of the power (*a*)

Proceeding upon the rightful assumption of such jurisdictional power in the Supreme Court, the Congress, by the Judiciary Act of 1889, already referred to, and in section 25 thereof, provided for the enforcement of this right by an enumeration of the cases in which it should be exercised — and this section may be justly regarded as a monument to the wisdom of the statesmen and lawyers of that age Some changes, in its phraseology, some omissions, and some additions have occurred, but in its main features, as the framework of a judicial system which had had no previous existence, and no parallel in the world's history, it stood the test of more than one hundred years, and indeed in respect to many of its more important provisions, it remains the law at present, practically as it was originally enacted Under this section the Supreme Court may exercise appellate jurisdiction over State courts in the following cases:[55]

1 The judgment complained of must be final — that

(*a*) Martin v Hunter, 1 Wheat 304, Cohen v State of Virginia, 6 Wheat 264

55 Rev Stat U S, § 709

is, it must have settled the rights of the parties so far as the State court is concerned.[56]

2. It must be the judgment or decree of the highest court in the State in which a decision in the suit could be had.[57]

The evident purpose of these two requirements is not to allow an exercise of this jurisdiction until the complaining party has exhausted all the remedies afforded him in the State courts

The succeeding portions of the section relate to the questions, one or more of which must arise in the suit as a prerequisite to the exercise of this jurisdiction. You cannot go to the Supreme Court of the United States from the final judgments of the highest court in the State in any and all cases, but only in cases·

1 Where the validity of a treaty made by the United States, or of a statute made by the United States, or the validity of an authority exercised under the United States, has been drawn in question, and the decision of the State court is *against* the validity of the treaty, the statute, or the authority.

2 Where a State has passed a statute, or has granted some authority which is being exercised, and the statute or authority is questioned upon the ground that it is repugnant to the Constitution, treaties, or laws of the United States, and the decision of the State court is *in favor* of the validity of such statute or authority.

3 Where some clause of the Constitution of the United States, or of some treaty or statute thereof, or of some commission held under the authority of the United States, is called in question, and the decision of the State court is *against* the title, right, privilege, or exemption claimed under such clause of the Constitution, treaty, statute, or commission.

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56 Houston *v* Moore, 3 Wheat 433, Parcels *v.* Johnson, 20 Wall. 653

57 Miller *v* Joseph, 17 Wall. 655.

The Supreme Court will not exercise this appellate jurisdiction over a State court, unless some one or more of these "Federal questions," as they are styled, both appear in the record and have been decided against the Federal right. There may be other questions, but it is the presence of the "Federal question," and the decision of the State court adverse to the Federal right or claim, that confers the jurisdiction. The mere *presence* of some one of these questions is not sufficient It must be *material*, it must appear to have been necessary for the State court to pass upon it in disposing of the suit, and it must have done so. If the State court, not passing on the Federal question, determines the case upon local laws, which do not involve the Federal right, or if, in such case, the State court should *unnecessarily* go forward and decide also the Federal question, this would not confer appellate jurisdiction on the Supreme Court.[58]

The Supreme Court has at all times manifested a wise conservatism in the exercise of this jurisdiction. It will not lightly assume the responsibility of interfering with the solemn and final adjudication of the State courts of last resort, and, indeed, it should never do so, except it be required in the protection of rights guaranteed by the supreme law of the land

§ 9. The appellate jurisdiction of the Supreme Court over the several inferior courts of the United States, in the absence of congressional regulation, would extend to every suit cognizable in those courts.

This would be so by the express terms of the Constitution, if the Congress should decline to exercise the right conferred upon it, to make rules and regulations upon the subject. But, beginning with the Judiciary Act of 1789, and following the history of legislation, it will be found that the Congress has greatly restrained

58 Murray *v.* Charleston 6 Otto, 432, Wolf *v* Stix, 6 Otto, 541; Beer Company *v* Massachusetts, 7 Otto, 25, Citizens' Bank *v* Board of Liquidation, 8 Otto, 140; Bank *v.* McVeigh, 8 Otto, 332.

the exercise of this power. It would be inexpedient to allow every case, great and small, that might arise in the inferior courts, to be taken on to the Supreme Court for final hearing. No one court on earth could dispose of the litigation that would accumulate on the docket if such were the rule Even under existing restrictions, which have made the judgments of these inferior tribunals *final* in a large proportion of cases, the docket of the Supreme Court is choked with litigation The Act of Congress passed March 3, 1891, was no doubt made necessary by the crowded condition of that docket It readjusts in a large measure the appellate jurisdiction of the Supreme Court, and is the most important and radical departure from the Judiciary Act of 1789, that has occurred in the history of Federal legislation. Under its provisions the Supreme Court exercises appellate jurisdiction in the following cases·

I. IN RESPECT TO THE CIRCUIT AND DISTRICT COURTS.

1. In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision

2 From the final sentences and decrees in prize cases.

3 In cases of conviction of a capital crime.

4. In any case that involves the construction or application of the Constitution of the United States.

5 In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question

6 In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States

From the final decisions of the District or Circuit Courts in cases arising under either of these six heads, appeals or writs of error lie direct to the Supreme Court.

2. IN RESPECT TO THE CIRCUIT COURT OF APPEALS.

This court was created by the Act of Congress 1891, before referred to, and it is therefore a new court in the judicial system of the Union. Some account of its establishment and powers is given in the succeeding section The appellate power of the Supreme Court over this court is most broadly stated in the act It provides that in all cases coming before the Circuit Court of Appeals, excepting those in which its judgments are final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars.

CIRCUIT COURT OF APPEALS.

§ 10. As just above stated the CIRCUIT COURT OF APPEALS was created by the Act of 1891. It is composed of three judges, any two of whom constitute a quorum. The act provides in section 3 that the chief justice and the associate justices of the Supreme Court, within the circuits to which they are severally assigned, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit in the court. The supreme judge in attendance upon the court shall preside at its sittings, and in his absence the senior circuit judge shall do so

The appointment of two additional circuit judges for each of the nine circuits has been provided for so that there are now three circuit judges in each circuit — and it is the design of the law in the first instance, that these three circuit judges shall constitute the courts in the several circuits, and that the district judges shall sit as members only when there is a vacancy by reason of the absence of the supreme judge, or of one or more of the circuit judges In the event of the absence of the su-

preme judge and the three circuit judges, does not act allow the entire court to be composed of district judges? The language used does not furnish a certain answer in the affirmative, but such appears to be its most probable meaning

The act creates nine courts corresponding with the number of circuits, and provides for annual terms to be held at a designated point in each of the circuits

This court is wholly without original jurisdiction; its powers being appellate only, and are exercised alone in respect to cases brought to it by appeal, or writ of error from the District and Circuit Courts

The language of the act creating the court is comprehensive and confers the appellate jurisdiction in respect to all final decisions of those courts, excepting only those cases mentioned in the preceding section in which the appeal or writ of error lies direct to the Supreme Court.

The decisions of this court in a large proportion of cases are subject, of right, to be reviewed in the Supreme Court by appeal or writ of error, but the statute provides that its judgments and decrees shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases But as a qualification of its powers as a court of last resort, it may in every case of such nature certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision, and thereupon the Supreme Court may either give its instruction, which shall be binding on the Circuit Court of Appeals, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon decide the whole matter in controversy as if it had been

brought there for review by writ of error or appeal. And if in any such case instruction be not asked for by the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari*, or otherwise, that the record be certified to the Supreme Court for review and determination with the same power and authority as if it had been carried up by appeal or writ of error.

CIRCUIT COURT.

§ 11. The Act of March 3, 1891, deprives the Circuit Court of the United States of all the appellate powers formerly exercised by it, and it remains as a court of original jurisdiction only, and this it exercises concurrently with the courts of the several States, in the following cases, provided the matter in dispute exceeds, exclusive of interest and costs, two thousand dollars;

1. All suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority

2 All suits in which the United States shall be a party plaintiff or petitioner

3 All suits between citizens of different States, or between citizens of a State and foreign States, citizens or subjects, or between citizens of the same State claiming lands under grants of different States

The original jurisdiction of the court also exists in respect to many other cases arising under the Constitution and laws of Congress, of a civil nature, and in respect to which there can be no limitation as to the amount involved, the enumeration of which would be out of place in a volume of this character. The student is referred to the statutes at large of the United States for more particular information on the subject.

The jurisdiction of this court as to crimes extends to all offenses cognizable under the authority of the United

States, and is exclusive in cases punishable capitally, but concurrent with that of the District Court in all other cases.(a)

§ 12. There remains still another jurisdiction of the Circuit Court to be noticed. It is peculiar in its character, and arises under the right which in recent years is frequently resorted to, of removing causes from State court to the Federal court

The judicial power of the Federal courts is unavoidably in some cases, exclusive of all jurisdiction in the State courts, and in others it is made so by legislation.[59]

The Congress by positive enactment has declared in certain cases the jurisdiction of the courts of the United States to be exclusive of the courts of the several States[60]

Beyond the enumeration in the statute the jurisdiction of the State courts is not taken away, except as to cases, if any should arise, where such jurisdiction would be incompatible with the powers granted to the United States.[61] There remains therefore a large number of cases in which the jurisdiction of Federal and State courts is concurrent, and in respect to very many of these Congress has made provision for their removal into the Circuit Court of the United States, where they have in the first instance been brought in the State courts. The substance of these enactments only will be given, the statutes being cited in the foot-notes. We will

(a) Rev Stat U S, § 629, subsec 20

59 Martin *v* Hunter, 1 Wheat 304, The Moses Taylor, 4 Wall 411

60. Rev. Stat U S, § 711

61 See Martin *v* Hunter, *supra*, Houston *v* Moore, 5 Wheat. 1, United States *v* Lathrop, 17 Johns 4; Claflin *v* Houseman, 93 U S 130 Actions under what is known as the *Civil Rights* Bill are of exclusive cognizance in the United States courts The first and second sections of the bill have, however, been declared unconstitutional, so far as they apply to the States See United States *v.* Stanley, 28 Alb. L J 406

notice first that class of cases with reference to which the statute requires that the amount in dispute exclusive of costs shall exceed two thousand dollars. They are as follows:

1. When the suit is against an alien or is by a citizen of the State where brought, against a citizen of another State, it may be removed *by the defendant.*[62]

2. When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same, and a citizen of another State, it may be removed *by such defendant alien, or defendant citizen of another State,* provided there can be a final determination of the controversy, so far as it relates to such defendant, without the presence of the other defendants.[63]

3 When the suit is between a citizen of the State where it is brought and a citizen of another State, it may be removed *by either party* upon proper affidavit that such party will not be able to obtain justice in the State court, because of prejudice or local influence.[64]

In the following cases removals from the State court to the Circuit Court of the United States are allowed without reference to the amount or value of the matters in dispute:

1. When the suit or criminal prosecution for any cause whatever is against any person, who is denied any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or when any such suit or criminal prosecution is against any officer, civil or military, or other person, for any arrest or other trespass or wrong made or committed, by virtue of authority derived from any law providing for

62 Rev. Stat. U. S., § 639, subsec. 1.
63 Rev. Stat. U. S., § 639, subsec. 2.
64 Rev. Stat. U. S., § 639, subsec. 3.

equal rights as aforesaid, such suit or prosecution may be removed into the Circuit Court by the *defendant* [65]

2 When any civil suit or criminal prosecution is commenced against any officer appointed or acting under authority of any revenue law of the United States, or against any person acting under the authority of any such officers on account of any act done under any such law; or is commenced against any person holding property by title derived from any such officer and affects the validity of any such revenue law; or is commenced against any officer of the United States or other person on account of any act done, or right, title, or authority claimed under the provisions of the "Elective Franchise Laws" by such officer or other person, the cause may be removed to the Circuit Court by the defendant.[66]

3. Whenever a personal action is brought in any State court by an alien against any citizen of a State, who is or was at the time the action accrued a civil officer of the United States, being a nonresident of the State

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65 Rev Stat U S, § 641 This section is not in conflict with the Constitution of the United States Strander *v.* West Virginia, 100 U S. 303 The Constitution and laws of the United States make the rights and responsibilities of the white and colored races exactly the same, and Congress has power under the Fourteenth Amendment to secure the rights of the colored race, by providing for the removal of causes into the Federal courts, if these rights are denied to them in the State courts, and this section was intended as a protection to them against *State action*, and against that alone Virginia *v* Rives, 100 U S. 313; Thomas *v* State, 58 Ala. 365, State *v* Gleason, 12 Fla 190

66. Rev Stat U S, § 643 This section is not in conflict with the Constitution Tennessee *v* Davis, 100 U S 257 Nor is it superseded by the Act of March 3, 1875 Venable *v* Richards, 4 Morr Trans 689. A suit against an officer under this section may be removed, although he is sued individually, and is sought to be held as a *wrongdoer* Van Zandt *v* Maxwell, 2 Blatchf 421 So an action of slander against a revenue officer Buttner *v* Miller, 1 Woods, 620 A criminal proceeding is *commenced* as soon as but not before the warrant is issued, and the cause is then removable, although the warrant is issued by a justice of the peace State *v.* Port, 3 Fed 117, State *v* Bolton, 11 Fed 217.

wherein the action is brought, such action may be removed to the Circuit Court by the defendant.[67]

DISTRICT COURT.

§ 13. The jurisdiction of the District Court needs no extended notice, as it is, as far as it extends, in almost every instance concurrent with that of the Circuit Court. It exercises only original jurisdiction. It takes cognizance of all offenses against the United States, except in capital cases, of all cases arising under any act for the punishment of piracy when no Circuit Court is held in the district of such court, of all suits at common law brought by the United States; of all suits in equity to enforce the lien of the United States for the payment of internal revenue; of all causes arising under the postal laws; of all civil causes of admiralty and maritime jurisdiction, of all cases of the condemnation of property taken as prize; and of matters and proceedings in bankruptcy

A further discussion of the establishment and jurisdiction of the Federal system of courts is not considered necessary. Enough has been said to put the student in the right way for finding the law upon the subject.

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67 Rev Stat U S, § 644.

CHAPTER II.

HOW A SUIT IS COMMENCED IN A COURT OF LAW.

§ 1. Anciently, every action at law had to be instituted by a process known as the *original writ*. This ancient writ had very much the form of what is now known as the alternative writ of mandamus

It was in the form of a mandatory letter addressed to the sheriff, issuing under the great seal and in the king's name, containing a concise statement of the cause of complaint, and requiring the sheriff to command the defendant to satisfy the complainant or appear before the proper court on a day named and account for his noncompliance. After retaining this form for many years, it finally lost the alternative feature, and ever since it has been known as the writ of summons. It has, however, in recent years in this country, undergone a still further change. All forms in actions having been abolished (or nearly so), it is not now required that the writ should specially state the cause of action So it is now only a *notice* to the defendant to appear and answer the complaint of the plaintiff. But this *notice* is necessary in every case proceeding according to the course of the common law, and suing it out when lawfully done, is in all courts of record the beginning of the suit [1]

There are exceptional cases where suits may be commenced and prosecuted without a summons, but in most of them something else is resorted to as a substitute for it, and in all of them special reasons exist for departing from the usual course. These cases will be noticed hereafter

1. § 3448, M & V But this rule does not apply to the suing out of warrants in suits before justices Maynard *v* May, 2 Coldw 44.

The writ of summons is *process*, writ and process being convertible terms Process is defined to be any command issued in the name of the State by any officer authorized to do so, and it is used for the purpose of giving compulsory effect to the jurisdiction of courts. There are three kinds of process used in a lawsuit:

1. *Original* or *leading* process, by which a suit is commenced To this class the summons belongs.

2 *Mesne* or *intermediate* process, which includes every kind of process that issues between the beginning and end of a suit. In the progress of a case various kinds of process may become necessary, such as subpœnas for witnesses, attachments, etc.

3. *Final* process, that by which the final judgment of the court is carried into execution and the fruit of the litigation attained This process, whatever may be the form of it, is a *writ of execution.*

HOW SUMMONS OBTAINED.

§ 2. The writ of summons, or *summons*, as it will be hereafter usually designated, being the *leading* process, is necessary as the first step or the beginning of every suit prosecuted in the ordinary course of law. There is always some one or more officers designated in the law as having authority to issue process from each of the courts. This is usually the clerk or deputy clerk of the particular court, and sometimes, and in some cases, it is the judge who holds the court.[2] Let it be supposed that the suit is to be instituted in the Circuit Court of the State. If the summons is the only process wanted, the attorney representing the plaintiff, or the plaintiff in person, must make his application for it to the clerk or deputy clerk of the Circuit Court in which he wishes to commence the suit.

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2. See § 3524, M & V, where certain powers touching the issuance of process seem to be given to the attorney.

The clerk is bound to grant the summons when so demanded, *upon condition:*

1. That the plaintiff enter into bond, with good security for the costs; or 2. That he take what is denominated the "pauper oath," which he is allowed to do as a substitute for a bond in every case, except in actions for "false imprisonment," "malicious prosecutions," "slanderous words," actions commenced by *original* attachment, actions of forcible entry and detainer, and actions of replevin For obvious reasons, these excepted cases should not be encouraged by allowing parties to prosecute them under the pauper oath, and hence the bond for cost is required [3] Bonds are also required of nonresidents (*a*) and by act Tennessee (1903) bonds are required in all suits for absolute divorce, except that where the petitioner is a female she is allowed to proceed without bond on depositing six dollars with the clerk of the court. (*b*)

The bond for cost may be in the following form:

Prosecution Bond.

We *James Smith* and John Snapp acknowledge ourselves indebted to *John Hart* in the sum of two hundred dollars, to be void, if the said James Smith shall prosecute with effect an action which he is about to commence in the Circuit Court of Wilson county, State of Tennessee, against the said John Hart or, if he fail to do so, shall pay all such costs and damages as may be awarded against him by the court having cognizance thereof

JAMES SMITH
JOHN SNAPP

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3. *Bonds* are required in cases of original attachment (see § 4212, M. & V) and forcible entry and detainer (M & V § 4079) Ancillary attachments may be issued on pauper oath. Barber *v* Denning, 4 Sneed, 267. Neither the bond or pauper oath is required for the issuance of judicial attachments 10 Humphr 264 An action of replevin cannot be prosecuted under the pauper oath The bond given in such a case, while costs may be recovered under it, is intended chiefly to secure the return of the property to the defendant But the bond being given, as required, in double the value of the property, if costs should accumulate to a larger amount, on a rule for further security, the plaintiff may take the pauper oath. Horton *v* Vowel, 4 Heisk. 622, Kincaid *v* Bradshaw, 6 Baxt 102. See also §§ 4113, 4212, 4079, M & V

(*a*) 14 Lea, 9. (*b*) Act 1903, approved March 26.

In the case in which this bond is supposed to be given James Smith is *plaintiff*, and John Hart *defendant*, that is, James Smith is the party who *sues*, and John Hart is the party *sued*. John Snapp appears in the bond as the plaintiff's *security* for the cost The bond does not state the nature of the action, and it is not necessary that it should do so,[4] but it is necessary that the bond should state the names of the parties to the suit, and it is proper that it should be made payable to the defendant.[5]

If the plaintiff should be defeated in his action, the defendant would be entitled to judgment against him and his surety for costs It may be that the defendant, in person, is entitled to receive no part of the cost; yet the judgment is, in legal contemplation, in his favor *for the use of* such persons as may be entitled to it The bond for cost is given for the protection of all persons who may be compelled to attend court as witnesses, or perform service as officers, by reason of the suit which the plaintiff institutes. The fees of witnesses for their attendance upon court, or the cost of procuring evidence in other ways, and the fees of officers for services rendered by them as such, and the tax upon litigation, all of which charges are fixed by law, constitute the costs in a suit The clerk is to determine in what sum the bond shall be taken He is to judge, from the best information he can obtain of the nature of the suit, whether the costs will probably be considerable or inconsiderable, and regulate the amount of the bond accordingly.

If the plaintiff, James Smith, is unable, owing to his poverty, to give the bond for cost, then he may, except in the cases above mentioned, offer as a substitute for it the pauper oath This oath must be reduced to writing,

4 Chanie *v* Bull, 8 Yerg 220 Broyles *v.* Blair, 7 Yerg 280
5. Broyles *v* Blair, 7 Yerg 279

signed by the plaintiff, and sworn to in the presence of the clerk or other proper officer,[6] and is to be in the following form:

Pauper Oath.

I, James Smith, do solemnly swear that, owing to my poverty, I am unable to bear the expense of the action which I am about to commence, and that *I am justly entitled to the redress sought*, to the best of my belief JAMES SMITH

Sworn to and subscribed before me, this ——— day of ———, 189 . W W. DONNELL, *Clerk*

The taking of this oath does not relieve the plaintiff from liability for the costs — it only *relieves him from giving security* for the costs. The rule is, in a court of law, that the losing party pays the costs, or, as it is otherwise stated, the successful party recovers costs. While the right to take the pauper oath is deemed a personal privilege, yet if the party be dead, insane, or an infant, his administrator, guardian, or next friend may prosecute suits in his behalf or for the benefit of his estate, on oath that he or his estate is unable to bear the expense, and in other respects complying with the form of oath required for paupers But the right thus given by the statute is subject to the restrictions before mentioned, and is therefore allowed to these parties only in those cases in which the pauper might have exercised the privilege had he been alive and a sane adult[7] But where the suit has been regularly commenced in "*forma pauperis*," and the plaintiff dies, the representative, in whose name the suit is revived, cannot be required to give security for costs (*a*) There is one important distinction between the right of plaintiff to commence his suit where he gives a bond for costs, and where he proceeds in *forma pauperis* In the first case, after the bond

6. 2 Pickle, 45
7. §§ 3913, 3914, M & V., Acts (Tenn) 1897, chap 133.
(*a*) 3 Sneed, 201.

is given, the law makes no further inquiry: the plaintiff's suit may be frivolous and groundless in right, it may be instituted out of malice to the defendant, and for the purposes of vexation, but, by giving the bond, he has secured the cost, and, in the eye of the law, protected the defendant and entitled himself to sue, and no one can hinder him. He may have to suffer the consequences of his folly — but this is his matter. In the other case, however, if he proposes to sue under the pauper oath, he does not *secure* the costs, and offers no protection whatever to the defendant from what may be a frivolous and vexatious suit; the law, therefore, demands *that he shall not only swear to his poverty,* but *that he is justly entitled to the redress sought*

This very wholesome provision, doubtless, prevents much unnecessary litigation on the part of irresponsible persons.

FORM AND ANALYSIS OF SUMMONS.

§ 3. The bond for cost being given, or the pauper oath taken, the clerk is bound to grant the summons — which may be in the following form:

STATE OF TENNESSEE.

To the Sheriff of Wilson County

Summon John Hart to appear before the Circuit Court of Wilson county, to be held at the courthouse in Lebanon, on the first Monday in May next, to answer James Smith, in an action to his damage, one thousand dollars

Witness my hand, this first Monday in January, 188

W W DONNELL,
Clerk.

This form agrees substantially, but not literally with that given in the Code of Tennessee, and with that in use in the several States

An analysis of this writ will enable the reader to understand the law which is embodied in its form In the analysis it is proper to divide the writ into several parts,

and for convenience, these several parts will be designated as follows, to wit. 1. The style. 2 The address. 3. The command. 4 The party defendant. 5. The citation. 6. The venue. 7. The party plaintiff. 8. The action. 9 The teste.

1. THE STYLE.

The *style* of a writ is the *name* of the *authority* by which it issues. In the above form it is "the State of Tennessee." The State is bound to afford to every citizen redress for his wrongs, and for this purpose it commands its officers to do whatever is necessary to afford that redress.

In the Constitution of Tennessee, art. VI, § 12, it is provided that "all writs and other process shall run in the name of the State of Tennessee, and bear teste and be signed by the respective clerks" Similar provisions are to be found in the constitutions or statutes of all the States. Under the laws of the Federal government, process runs in the name of "the President of the United States" In England it runs in the name of the reigning monarch, as "Victoria, Queen of England." The State or sovereign is the only authority that can justify the issuance of process; if it should issue by any other authority, it would be void.[8]

2. THE ADDRESS.

The *address* or direction of the writ is "to the sheriff of Wilson county" When there is no sheriff, or he is imprisoned, or is a party, or when it appears from an affidavit or the papers that he is interested in the suit, or when he is otherwise incompetent, the writ and other process are to be directed to the coroner of the county[9]

8 Mayor and Aldermen *v.* Pearl, 11 Humphr 250, 8 Pick 525

9 § 437 *et seq*, M & V., 2 Coldw. 310 But this rule is not enforced where the sheriff is only a nominal party and no redress is sought against him Avery *v* Warren, 12 Heisk. 550.

But the process must be *directed* to the coroner to give him the power to serve it. If it is *directed* to the sheriff, the coroner cannot execute it.[10]

There is nothing, however, in the law which will prevent the sheriff from executing and returning process issued against himself The execution and return of it would at least have the effect of an acknowledgment of service upon himself.[11] The sheriff is the officer whose duty it is to execute all process from courts of record, and all the above supposed disabilities being out of the way, the writ should, of course, be directed to him.

The law authorizes the sheriff to have one or more regular deputies[12] Process is not directed to them, but they may serve process directed to the sheriff The legal incompetency of the sheriff to serve process will render those whom he has selected as his deputies equally incompetent; but if the office of sheriff should become vacant, the deputy may proceed to execute process *in his hands* the same as if such vacancy had not occurred.[13]

The sheriff may also appoint as many special deputies as he may think proper on urgent occasions.

3. THE COMMAND.

The *command* of the writ is contained in the word "summon" This is not the command of the clerk, nor of the court, but of the State. It is this command which gives to every writ its power as well as its name The words "*you are hereby commanded to,*" which usually precede in the writ the word "*summon,*" are useless and are dropped from the form given above.

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10 10 Humphr 346
11. Carson *v* Browder, 2 Lea, 701
12 § 414, M & V
13 § 426, M & V.

4. THE PARTY DEFENDANT.

This is the person who is sued, and in the form of the writ given, he appears as John Hart. Both the christian and surname should be stated without abbreviation. It is best to insert the full name, but this may not always be practicable, and then the name by which the defendant is known will do His name may be John *Randolph* Hart, but he may be known only as John Hart, and this would be sufficient. If he is being sued, however, upon a written instrument, the name used in the instrument is always sufficient [14]

It is difficult many times to determine who should be a defendant. In actions of tort whoever actually does the wrong, or procures it to be done, is a proper person to be sued. And so a person who is present at the commission of a trespass encouraging or inciting the same by words, gestures, looks, or signs, is in law deemed to be an aider and abettor, and liable as a principal [15] If several are concerned in the wrong, either one of them may be sued alone, or all, or any two or more of them may be sued jointly. Whether separate actions could be brought against each wrongdoer and prosecuted to judgment, was at one time thought to be doubtful, but it is now settled in this country that such separate actions can be brought [16] No matter how many judgments may be obtained, however, the plaintiff can have but one satisfaction of the wrong, and when either one is paid, this will preclude the plaintiff from proceeding upon either of the other judgments except for costs [17]

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14 § 3485, M & V, 12 Lea, 381

15 Hilliard on Torts p 293

16 Levingston v Bishop 1 Johns 290, s c, 3 Am Dec 330; Knott v Cunningham, 2 Sneed, 204; Blaun v Crocheron, 54 Am Dec 200, and note

17 Knott *v.* Cunningham, *supra*

It is often said that when the wrongdoer dies the wrong dies with him, which means the injured party is left without any remedy for the wrong which he has suffered. This is not so, however, in all cases.

If the wrong consists in taking and converting personal property, the plaintiff may waive the wrong and bring his action against the administrator or executor of the dead wrongdoer for the value of the property the same as if he had sold it to him.[18] This, however, is not, strictly speaking, an exception to the rule that the wrong dies with the wrongdoer, for it will be observed the suit is on an implied contract, and not on the tort.

But there are many qualified exceptions to the rule. The statute of Tennessee enacts "that no civil actions *commenced*, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party."[19]

A similar rule doubtless exists in other States. If the injured party show a desire to redress his injury by instituting a suit for that purpose, the subsequent death of the wrongdoer cannot, under this statute, affect the right of the plaintiff, unless his action be for wrongs affecting his character, as an action for slander or libel.(*a*) In these cases of slander and libel, the old common-law maxim, "*actio personalis moritur cum persona,*" prevails with full force, and the death of either party destroys the right of action, and this is so whether the death occur before or pending suit But the death of a party after the judgment has been rendered does not affect the rights of parties The claim for damages is then merged in the judgment, and becomes a debt, and upon the death of a

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18. Alsbrook *v.* Hathaway, 3 Sneed, 454; Barbee *v* Williams, 4 Heisk 202

19. § 3560, M. & V.

(*a*) 7 Baxt 299, 16 Lea, 10 Breach of marriage contract is wrong affecting character 3 Pickle, 442; 17 Pickle, 689

party the judgment may be revived against the personal representative. Upon appeal in error from the judgment, however, and reversal, the demand assumes its original nature, and the suit abates.(*b*)

The form of the writ, it will be seen, does not state why or for what cause the suit is instituted. It only requires the defendant to answer the plaintiff in *an action* without more. It may be that the plaintiff is suing the defendant on contract. Who should be defendant in tort has been considered; it is now proper to consider *who should be made defendant in an action on contract* At the common law, all the contractors in a *joint* contract had to be sued jointly. If it were a joint and several contract, either one might be sued alone, or all, or any number jointly, and separate actions might be prosecuted at the same time against each one of them. The rule requiring all the parties to be jointly sued, where the contract was joint, was not only of great inconvenience, but in many cases expensive, and it has been changed almost universally in the United States. The change has been made in Tennessee by this sweeping clause, "All joint obligations and promises are made joint and several," [20] and by another clause it is said persons jointly or severally, or jointly and severally bound, may all, or any part of them, be sued in the same action.[21]

There is nothing in the Code of Tennessee which prevents the plaintiff from getting separate judgment against each separate obligor, which is precisely the common-law rule as stated above But again, as in actions on tort, a satisfaction of one of the judgments would be a satisfaction of all, except as to costs Such a multiplicity of suits, however, should not be encouraged, and unless there should appear some sufficient

(*b*) 1 Head, 540; 16 Pickle, 7, 17 Pickle, 689
20. § 3486, M & V. 21. § 3484, M & V

reason for splitting up the plaintiff's right of action, it would present a proper case for the exercise, on the part of the court, of that common-law rule, which permits the consolidation of actions, and prevents the unnecessary accumulation of costs.[22] Partners are joint contractors, and may, like others, be sued either jointly or severally. If they are all to be sued, the writ should state the names of the individuals who compose the firm. The sheriff should not be directed to summon John Den & Co., but John Den and Richard Fen, partners under the firm name of John Den & Co. If one of the partners should die, or one of the joint contractors in any case, at the common law, the survivor alone could be sued, but under the rule now, as above stated, not only the survivor alone, but the administrators or executors of the deceased party alone, or both the survivors and administrators or executors of the deceased party may be sued. If the suit is against an executor or administrator, the writ would run thus: "Summon John Hart, executor or administrator of John Den, deceased, to appear," etc. It is not actually necessary to put the representative character of the plaintiff or defendant in the writ It is sufficient if this be shown in the declaration[23] If there is more than one executor or administrator, they must all be sued, unless one has removed from the State, and then those who remain may be sued.[24] If a corporation is to be sued, the corporate name, and not the names of the individuals who compose the corporation, or who, as officers, manage its business, must be inserted in the writ Thus, if the suit should be against one of the banks of Lebanon, the writ would be against the National Bank of Lebanon, or the Second National Bank of Lebanon, and not against the officers, who happen to

22 Rap & Lawr Law Dict p 270
23. Tidd Pr 450; 2 Lomax Exrs 596
24. § 3488, M & V. Removal does not mean temporary absence, but a change of residence Bledsoe *v.* Huddleston, 5 Yerg 295

be in control of its affairs. If the suit is to be against a married woman, her husband must be joined with her in the writ. This was so at the common law, and is still generally so in many of the States. But in recent years, many changes have been made in relation to the rights and liabilities of married women. She is allowed in many cases to make contracts which was not so at the common law, and she may be sued on them the same as a *feme sole*, that is, as a single woman, and without joining her husband with her In Tennessee, however, the right to sue her alone, exists only in cases where her husband is an alien, or has abjured the realm, or where she has been abandoned by him, or where he has been duly declared a person of unsound mind, etc [25] If she utters a slander, or commits a trespass, she and her husband must be jointly sued. If the suit is upon any contract or wrong of an infant, or lunatic, such infant or lunatic must be made defendant in the writ, and not his guardian. The guardian is not responsible for the contracts of his infant or insane ward, and cannot be sued on them [26] If the guardian makes the contract, then he alone must be sued, and not the ward.[27]

5. THE CITATION.

This word is used to indicate that part of the writ which gives *notice* to the defendant *when* and *where* he is required to appear. The language of the writ included under this head is as follows: "To appear before the Circuit Court of Wilson county, to be held at the courthouse in Lebanon, on the first Monday in May next." It would

25. §§ 3345, 3505, M & V; 7 Baxt 361, 1 Heisk 360, 6 Lea 488; Bottom *v.* Corley, 5 Heisk 12, 3 Sneed, 337. But now, in Tennessee, a married woman may be sued as a *feme sole* in respect to debts incurred by her in any mercantile or manufacturing business in which she engages, and in such cases coverture shall not be a good defense Acts 1898, chap 82

26 1 Pars. Cont. (6th ed), bot p. 148, and cases cited

27. 1 Pars. Cont. (6th ed.), bot. p 148, and cases cited.

be unjust to allow the plaintiff to go on and get a judgment against the defendant without notifying him when and where he may appear and defend the action. He is not, as a rule, bound to appear and defend the suit, although he receives the notification to do so; but if, after receiving the notice, he chooses not to appear, his absence is considered an admission of the justice of the claim, and the plaintiff may proceed to judgment against him.

That part of the writ above quoted tells the defendant before *what court* he must appear. As there are various courts in our judicial system, the defendant is entitled to know before which of these he is to appear. The court should be styled in the writ, just as it is in the law which creates it. The court in which the suit should be brought was determined in investigating the question of jurisdiction which has been sufficiently considered in the last chapter. It will be observed that the writ tells the defendant when he is to appear, "*on the first Monday in May next*" The time is fixed to suit the terms of the court Courts hold their regular sessions or terms at stated periods fixed by law, and they usually, but not uniformly, begin on Monday. The Mondays, or first days of the terms, are designated as the first, second, third, or fourth Monday of the particular month in which the court sits Civil process, with few exceptions, is to be made returnable to the first day of the term next ensuing its issuance.[28] But this rule is qualified by another, namely, that the process must be issued and served upon the defendant at least five days before the return day, that is, five days before the first day of the next term.[29] If the term begins on Monday, the Wednesday next preceding is the last day for the service of process returnable to that term. In computing time under this rule, the day of service is counted, no matter how late on that day the service is

28 § 3535, M. & V. 29. § 3535, M. & V.

had.[30] If the writ should be issued, or the sheriff should serve it upon the defendant *within the five days,* then the defendant cannot be required to appear on the first day of the next term, but it will be the duty of the sheriff, contrary to the face of the writ, to summon the defendant to appear on the first day of the term next succeeding the one named in the writ.[31]

The Circuit Courts of Tennessee hold three terms annually, at intervals of four months. Taking the first Monday in May as the beginning of one term, the next term would begin the first Monday in September, and the next the first Monday in January.

Each term is the *return* term for all process issued and served five days or more before the term begins

Each return term is also called the appearance term, because the defendants who have been served with process are expected to *appear* at the *return* term and make their defense.

The writ also, with great particularity, tells the defendant that the court before which he is to appear will be "held at the courthouse in Lebanon." Every court is required to sit in the courthouse, unless the court deems it impracticable or inconvenient, and in that case it may occupy any other room in the county town.[32] Two courts may have to sit at the same time in the same town; if they cannot agree as to the use of the courthouse, the County Court has the preference on the first Monday in each month, and the Circuit Court is next in right over the Chancery Court.[33]

It is further provided, that if the Circuit Court is excluded from the courthouse by the County Court on any

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30 Dickinson *v* Lee, 2 Coldw 619, where the text is especially approved

31. § 3535, M & V.

32 § 4870, M & V.

33. § 4871, M & V.

first Monday, that the Circuit Court shall try no jury causes on that day, except by consent of parties [34]

The law makes no provision in any case for holding the court beyond the limits of the town, which may be the county town, or the town in which the court is authorized by law to be held.

These provisions, which perhaps exist in many of the States, are not to be considered of light importance. The sessions of courts are not only definitely located, but are open to the public, subject, of course, to the enforcement of all reasonable rules necessary for good order and decorum The general public, as well as litigants, have a right to know where the courts of the country are to be held, and it would be unsafe to allow the judges or other officers, upon their own motion, and without reasonable cause, to transfer the sessions of the courts from place to place.

6. THE VENUE.

Is the next thing to be considered in the writ, and this presents itself in the words, "*Wilson county*" The word *venue* is said to be derived from the Norman-French *visne*, which was the old name for a jury, because formerly the jurors were taken *de vicineto*, from the neighborhood where the matters in question had taken place [35] The word, in the use now made of it, is synonymous with the expression, "place of trial," [36] and we mean by the use of it, the *county* in which the action is to be tried.

An action cannot be brought in *any* county at the mere election of the plaintiff. It is therefore important to consider in what county a suit may be brought. There is but little difficulty in determining the venue if the distinction between transitory and local actions is kept

34. § 4872, M & V
35. Co Litt. 125*a*, 158*b*, Rap. & Lawr. Law Dict, p. 1336
36. 7 How. Pr (N. Y.) 462.

well in mind. Transitory actions are actions for causes that may have happened anywhere,[37] as a debt may have been contracted anywhere, personal injuries may have been inflicted anywhere, character slandered, personal property taken anywhere. In transitory actions the general rule is, that the right of action follows the person of the defendant, that is, he may be sued, and therefore the venue is in any county in which he may be found.[38] If the action is for the recovery of personal property which has been taken, the right to sue for it would follow the property, and the venue would be wherever the property is found, and in actions commenced by the attachment of property without personal service of process, the venue may be in any county where the defendant owns property which is subject to attachment.[39] Section 3514 of M. & V. Code, Tennessee, provides that "if the plaintiff and defendant both reside in the same county of this State, *such action* shall be brought in the county of their residence." This rule can have no effect whatever upon purely local actions which are to be presently noticed, neither can it affect actions brought for the recovery of personal property, nor actions commenced by the attachment of property, both of which are noticed above. This section 3514 immediately follows the section which regulates the venue in purely transitory actions, such as those for debt, those for slander, etc, and the words "*such action*," are manifestly, although used in the singular number, intended to relate alone to the actions spoken of in the preceding section.

37 Stephens on Pl, p 288

38. § 3513, M. & V The right of action *follows* but does not *precede* the defendant, and so it is held that a summons cannot be issued in *advance* of the defendant's coming into the county and kept there in waiting for him If the defendant is a nonresident of the county, and is not actually in the county at the date the summons is sued out, the court acquires no jurisdiction by service of the writ, and the suit may be abated Carlisle *v* Cowan, 1 Pickle, 165.

39. § 3515, M & V.

And thus interpreted it is a just rule, for it would be most unjust to permit the plaintiff in a simple action of debt or other such action, although the venue may be wherever the defendant may be found, to catch his neighbor away from home, and the home of his witnesses, and surprise him with a suit which, however able he may be to resist at home, he is wholly unable to do so among strangers. Such oppressive use as this would be of the process of courts is prevented by section 3514, and it is believed this was all it was intended to do.

Local actions are such as necessarily refer to some particular locality, or which carry with them the idea of some certain place, and the venue of such actions is always the county of the particular locality or certain place Land cannot be withheld from the owner, nor a trespass committed on it, anywhere else than where the land lies. Therefore, the action for land or for injuries to it is not transitory, but a local action, and must be brought in the county where the land lies[40] This is so although the defendant reside in another county, and cannot be found in the county where the land is Process in *local* actions may run to any county in the State,[41] and so the summons would be directed to the sheriff of any county in which the defendant may be found

A corporation is a *person* in law, and of course actions against it may be either transitory or local. If the action brought is *local* in its nature, or if it is commenced by the attachment of property, and without personal service of process, or if it is brought to recover posses-

40. § 3515, M & V This section as to real actions is only declaratory of the common law 1 Chit 268. Section 3517, M & V, allows an action which is brought in the wrong county to be prosecuted to a termination, unless abated by plea of the defendant If it is a local action, the court in such a case would have no jurisdiction, and it could not be conferred by consent or the failure of the defendant to plead in abatement. See 9 Yerg. 30, 2 Yerg 580. It is considered that this section was not intended to apply to local actions.

41. § 3525, M & V.

sion of personal property, the rules would be the same as those stated above in cases of like nature against *natural* persons. As to purely transitory actions the *person* of the corporation is split into as many parts as the corporation has offices, agencies, and directors; and such actions, for any cause arising out of the business of the corporation, may be brought in any county where the corporation has an office, agency, or resident director. And this is so whether the cause of action arose out of business conducted by the local office, agency, or director, or out of the business of the corporation in the particular county where the suit is brought or not.[42] And in the case of natural persons the statute provides that any individual or company having an office or agency in another county than that of their residence, may be sued in such other county, touching any matter growing out of the business of such individual or company. And it is not necessary that the cause of action should have arisen out of business conducted by the local agency, or out of business transacted in the particular county where the suit is brought.[43] A county is a corporation, and suits may be maintained against it as against other corporations.[44] There is no difference in the rule as to the venue in actions brought against counties and those brought against other corporations, except that, perhaps, the provisions of section 3539, M. & V. Code, were not intended to and do not apply to counties. Section 460, M. & V. Code, provides that process *shall* be served on the presiding officer of the County Court. Section 3539 provides that process may be served on any agent or clerk. This conflict in the statute strengthens the conclusion that counties were not intended to be included in the provisions of section 3539

42. § 3539, M & V., Topping *v.* Railroad Co., 5 Lea, 600.
43. § 3539, M & V.; Topping *v.* Railroad Co., 5 Lea, 600.
44. §§ 459, 460, M. & V.

The plaintiff may wish to sue several persons as defendants in the same suit, and they may not all reside in the county in which he proposes to begin his action In that case he is entitled to have an *original* summons issued to the county of the venue for such defendants as may reside or be found there and *counterpart* summons to any counties in the State where he supposes the other defendants may be found In such a case it is made the duty of the clerk of the court or the justice of the peace to note upon the original summons in substance the following: "A counterpart of this the original summons issued to Smith county for John Scott," and upon the counterpart summons the following: "This is a counterpart of an original summons issued to Wilson county for John Hart "[45] Each of these indorsements should be signed by the clerk of the court or the justice of the peace, though the statute does not expressly require this to be done. If the plaintiff wishes to sue the drawer or indorser of a bill of exchange, or the maker and indorser of a note in the same action, and they reside in different counties, he cannot commence his action in one county against the *indorser* and issue a counterpart summons to another county against *maker* or *drawer.* The original summons must be issued against the maker or one of the makers, if there be more than one, and then a counterpart summons can go to any other county against the indorser[46] This rule is not for the benefit of the indorser, but it is said the statute creating the rule was enacted for the protection of the drawer or maker, and to correct an abuse which had grown out of the nominal indorsement of negotiable paper with a view to confer jurisdiction upon the court of the county, in which such nominal indorser resided, as against the real parties to the instrument.[47]

45. § 3526, M & V.
46 § 3528, M & V
47 Rich *v* Rayle, 2 Humphr. 404; Bank of Tennessee *v* Anderson, 3 Sneed, 669.

And it has been accordingly held, that an original summons may be served upon an indorser, and a counterpart summons issued to another county for other *indorsers,* but *not* for the drawer or maker.[48] And in harmony with these decisions, it has been held that the venue cannot be fixed by serving the original summons upon fictitious or immaterial defendants, and sending counterparts for the real defendants to other counties. The original summons must be served upon a *real* and *material* party before the counterpart issues.[49]

The venue in all criminal prosecutions, as fixed by the Constitution of the State, "is the county in which the crime shall have been committed,"[50] and it cannot be changed, except upon the application of the prisoner, or his consent given in open court. When an offense is committed partly in one county and partly in another, the venue is in either county.[51] So when committed *on* the boundary of two or more counties.[52] So when property is stolen in one county and brought by the thief into another,[53] and when property is stolen in another State and brought by the thief into this State, the venue is in any county into which the property is brought.[54]

7. THE PARTY PLAINTIFF.

Is the next head in the analysis of the writ, and this involves the important inquiry, *who is the proper person to be plaintiff in the action?*

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48. Turley *v* Hornsby, 3 Lea, 264.

49 Yancy *v* Marriatt, 1 Sneed, 28; Achy *v.* Holland, 8 Lea, 510, expressly overruling Rich *v.* Rayle, *supra,* but not in the particular for which it is above cited

50. Const Tenn., art 1, § 9, State *v* Denton, 6 Coldw 539; Armstrong *v* State, 1 Cold v 337 This last case held section 4976, T & S Code, unconstitutional in so far as it made an offense committed in one county, but in one-quarter of a mile of the boundary of another county, indictable in either

51. § 5803, M & V

52. § 4976, T & S.

53. § 5805, M. & V.

54. § 5804, M. & V.

If the suit is upon a contract, the rule is that all the parties with whom the contract was made must sue for the breach of it.[55] Thus, if a note is made payable to A and B, they must both sue. So if the contract be to work for them, or to deliver them goods, they must both join in the suit. The mere designation of the *share* of the obligee will not create such a severance of interest as to sustain a several action, but all must join in an action for the whole.[56] But if the contract is so formed as to contain distinct promises, of distinct sums, to distinct payees, they would then have several interests, and certainly may, perhaps must, bring separate actions.[57]

It may be stated, as a rule of universal application in courts of law, that a suit upon a contract, express or implied, must be brought in the name of the person in whom the legal interest is vested, and this is so notwithstanding the *beneficial* interest, by the terms of the contract, may be vested in another person.[58] This is a common-law rule also. But the common law went further, it did not allow the party entitled to sue to assign his right of action to another. Under this rule there could be no new parties by assignment, and the litigation in courts of law would be narrowed to a contest between the original parties to the contract. Bills of exchange, the earliest form of commercial paper, doubtless possessed the quality of negotiability from the first, and constituted an exception to the rule forbidding the assignment of causes of action; but, however this may be, the rule itself has been almost entirely swept away by the legislation of the last century. So that now, in respect of nearly all written contracts, some one else than the original beneficiary or party may

55. McNairy *v.* Thompson, 1 Sneed, 140.
56. 1 Pars. Cont. (6th ed.) 13.
57. 1 Pars. Cont. (6th ed.) 13, and note.
58. Gwinther *v.* Gerding, 3 Head, 197; Fackwickle *v.* Keith, 1 Heisk. 360.

become the legal owner thereof, and may sue in his own name.

The statutory regulations in Tennessee, which are substantially those of all the States, *assume* that bills of exchange are negotiable, that is, that the payee, by writing his name across the back of the bill, and delivering it to another person, may thus make such other person the legal owner of it, and that this new party and legal owner may, by like means, confer like rights upon still another party, and so on and on The original legal owner of such a bill of exchange is called, in law, the payee or holder, and any subsequent legal owner, made such owner in the manner above indicated, is called indorsee or holder The statute having *assumed* the negotiable character of a bill of exchange, proceeds to put upon equal footing with it in point of negotiability, every note, *bill*, or bond, whereby the maker promises to pay *money* to another person, and the indorsement of such paper makes the indorsee the legal owner thereof, and confers on him the right to sue thereon in his own name.[59]

By another provision of the Tennessee statute, which is perhaps the law of most of the States, it is provided that bonds with collateral conditions, bills or notes for specific articles or the performance of any duty, shall be *assignable*.[60] This rule does not extend the principle of *negotiability* It only enables the assignee of negotiable paper to bring suit in his own name.[61] There is a marked dis-

59 §§ 2713, 2714, 2715, M & V. To be negotiable, the paper must be payable in money without limitation or condition 6 Humphr 303, Moore *v* Wier, 3 Sneed, 45, Waif *v* Tyler, 1 Heisk 316, and cases cited The word "bill," used in stating in the text, the statute of Tennessee, does not mean bill of exchange, but *bill single*, which is a note for money under seal. Owen *v* Owen, 3 Humphr. 327 This case is also authority for saying it needs no statute to make bills of exchange negotiable. They are so by the Law Merchant

60 § 2724, M. & V.

61. Looney *v* Pinckston, 1 Tenn (Overt.) 384, and cases cited in reporter's head-note

tinction between the rights and equities of the holder of a *chose in action*, which is assignable *only* in the one case, and negotiable in the other. In both cases, the holder has the legal title, and may sue in his own name;[62] but, in the former, the holder's rights are subject to all existing equities between the original parties, while in the latter, they are not. It would be out of place here to enter into the effect of this distinction; the reader is referred to authors of great learning who treat of the subject fully.[63] These sweeping clauses have covered a large part of the transactions between man and man, still, there remain some contracts and rights arising out of contract which cannot be transferred so as to confer upon the assignee the legal title, and the right to sue in his own name. Among these are judgments, simple accounts,[64] and notes transferred by delivery only, except notes payable to bearer. In these, and other like cases—and to these would belong the sale of rights under unwritten contracts — the holder or purchaser is not the legal but equitable owner, and the suit must, in such case, be in the name of the party from whom he receives the paper or the right for his (the holder's) use The person for whose *use* the suit is brought is, for most purposes, deemed in law the *real plaintiff*.[65] In actions upon official bonds, including bonds given by guardians, administrators, or by other persons who are required by

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62 3 Coldw 431; Gwinther *v* Gerding, 3 Head, 198, Moore *v.* Wier, 3 Sneed, 47, Gatewood *v.* Denton, 3 Head, 381

63. 1 Pars Cont (6th ed), chap XIV, XVI, 3 Kent's Comm, Lecture XLIV

64. Neilson *v* Hord, 7 Yerg. 473; 2 Head, 116

65. § 3492, M & V But, in the case of Railroad *v* Henderson, 1 Lea, 1, it is held, *arguendo*, that the *nominal plaintiff* was the real plaintiff, and, chiefly upon this conclusion, it was held, by one of the learned justices of the Supreme Court, that the right of action for a tort was assignable The suit, being in the name of the *alleged* assignor for the use of the *alleged* assignee, was really the suit of the injured party — it being implied that the person for whose use the suit was brought was the attorney to sue, and not the assignee. See the dissenting opinion of McFarland, J.

law to give bonds for the security of the public or of individuals, any person may sue who is injured by the breach of them; but, as such bonds are generally made payable to the State, the party aggrieved must bring the suit in the name of the State for his use.

If the suit is to enforce any right of the wife, in all cases except where the statutes have introduced innovation upon the common-law rule, her husband must be joined with her The rule which has been already considered for determining who should be defendant in the case of husband and wife, would control in a like case in determining who should be plaintiffs. Whenever the law would require husband and wife to be joined as *defendants,* it would, in a similar case, require them to be joined as *plaintiffs.* And, in cases where the law makes the wife *suable* alone, it confers upon her the corresponding right to *sue* alone In a proceeding for divorce, which either may institute against the other, the wife sues the husband in her own name. In no other case can a husband and wife sue each other in a court of law in Tennessee. They must each look to the Chancery Courts in all other proper cases for relief. The vast changes in the laws relating to married women of recent years may have resulted in a different rule in some of the States. An unmarried female may sue for her own seduction [66] This was not so at the common law;[67] but, if there was a breach of promise to marry, she could sue for that and, in aggravation of damage, give in evidence the seduction. The father also may sue for the seduction of his daughter, although she may not be living with him or be in his service.[68] This is another change in the common law. The gist of the father's action, at the common law, was the loss of the daughter's

66 § 3501, M & V This section was taken from the Alabama Code (1852), § 2133

67. Caun *v* Wilson, 2 Tenn (Overt) 233

68 § 3502, M. & V. This is taken from the Alabama Code of 1852, § 2134.

services. The statute makes the atrocity perpetrated by the seducer the gist of the action, and of course the father need not show any loss of service from the wrong. If the father be dead, or has deserted his family, the mother may bring the suit. But a recovery of damages by the daughter, father, or mother, is a bar to the action of the other.[69]

An infant sues by his regular guardian, or next friend (*prochein ami*), and cannot sue otherwise,[70] except that by statute in Tennessee a minor may sue in his own name to recover damages for a personal injury (*a*) A person of unsound mind may sue by next friend or guardian,[71] or he may sue in his own name;[72] which is allowed at the common law.

For injuries to property, all the owners of the property must join in the suit — because the injury is joint; the rule in such cases of tort being the same as in cases of contract, which, as before shown, requires that all the parties to the contract must join in the suit.[73]

The general rule is that for a *joint* injury a *joint* right of action is given This would arise in every case where the injury is to the property *jointly* owned by several parties.

But, if the tort be an injury to character or person, as the injury arising from slander, assault and battery,

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69 § 3502 M & V As to gist of the action by the father at the common law, see 5 Sneed, 147, 3 Sneed, 30, 5 East, 45; 1 Smith, 133, 10 Johns 115, 9 Johns 337; Vossel *v.* Cole, 47 Am. Dec 130, 53 Am Dec 338

70 Green *v* Harrison, 3 Sneed, 132

(*a*) § 3504, M & V , 7 Lea, 719

71 Parson *v* Kinzer, 3 Lea, 346

72. Rankin *v.* Warner, 2 Lea, 302

73. Chit Pl., Vol I, pp. 64–66, and authorities cited; Winters *v* McGee, 3 Sneed, 128. But, if A and B are joint owners of a chattel, and A. convert the property by a sale, B. may sue A for the conversion And so, if A 's interest be levied upon, and the sheriff, upon a sale under the execution, deliver the chattel to the purchaser, B may sue the sheriff for the conversion 4 Humphr 355, 417 The case of Logan *v.* Hartford Coal Co , 9 Heisk. 689, is not clear If it is against the text, it is contrary to authority, and is not supported by the cases to which it refers.

etc, it is difficult to conceive a case of joint right of action. The same slanderous words, which would affect the character of many persons, would give to them no joint right of action — for the law recognizes no joint ownership of character. Each person owns, and must protect, his own character. This is so even in the case of the character of the wife; though, if her character be injured, her husband must join with her in the action.[74]

The same rule exists where the injury is to the person and not to the character The general rule upon this subject is stated thus: for injuries to the person or character of another, the action can be brought only in the name of the person immediately injured[75] The rule, from the impossibility of conceiving it to be otherwise, would seem to be as above suggested, that no joint right of action can arise from an injury to person or character The books, however, have some apparent exceptions. It is said that partners in trade may join in an action for slanderous words spoken concerning them in the way of their joint *business*, and that joint tenants may join in an action for slander of their *title to the estate*[76] These, however, are only apparent exceptions. The gist of the action in neither case is injury to person or character, but to the *business* or *estate* of the plaintiff, and would more naturally belong to that class of cases where the injury is to the common property of joint owners, in which case, of course, the joint right of action exists

The difficulty of determining who should be plaintiff is frequently increased by the death of the party or of some of the parties entitled to sue on the face of the contract, or by the death of the party in the case of tort.

There were two rules of the common law, one of which has been referred to, but both of which it will be proper to state together in this connection. The first of these

74. 1 Chit Pl 73
75. 1 Chit. Pl. 61, 64.
76 1 Chit. Pl. 64, 65, and note.

rules is stated as follows: If two persons are bound *jointly* to pay a sum of money, and one of them dies, his death not only severs the joinder but terminates the liability which attached to him. This left the survivor alone bound for the debt and alone suable, and if he died the liability and right of action survives alone against his representative, and if the survivor or his representative paid the debt, he could have no contribution at law against the estate of the other party, for this would be an indirect revival of a liability which death had terminated Contribution, perhaps, in such a case could have been enforced in equity.[77]

The other rule of the common law is stated thus: If one of two joint *obligees* dies, the right of action is solely in the survivor; and if all die, the action must be brought by the representative of the last survivor, and in this case there was no contribution at law against the survivor for the share of the deceased, but was in equity [78] These rules have been abrogated by statutory regulations That is, all contracts have been made, both joint and several, and thus all rights and liabilities under contracts survive in favor of or against the representatives or heirs-at-law of the deceased parties [79] The construction placed upon our statute abolishing the doctrine of survivorship[80] confers a joint right of action upon the survivor and the representative of the deceased party.[81]

It is admitted that in a somewhat later opinion of the Supreme Court, precisely the contrary construction was given to section 2817, M. & V Code,[82] but the practice in

77. 1 Pars Cont (6th ed), pp 30, 32, and note *d*, York *v* Peck, 14 Barb 644
78 1 Pars Cont (6th ed), p 31, Anderson *v.* Martindale, 1 East, 497
79. 1 Pars Cont , p 30, and cases cited.
80 § 2817, M & V
81. Perkins *v* Hadly, 4 Hayw 148.
82. Sappington *v.* Phillips, 1 Yerg 105.

Tennessee has agreed with the adjudication in 4 Haywood Reports

And again by another section of the Code, which seems by necessary implication to uphold the Haywood decision and the practice under it, it is provided that when one of two or more plaintiffs die the defendant may elect to proceed to trial with the survivor, or have the suit abated if *it is not revived in the name of the representative of the deceased plaintiff*[83] There could be no reason for allowing the defendant to abate the suit on the ground that the representative of the deceased plaintiff was not made a party, unless he was a necessary party, and if the sole right to sue, as held in 1 Yerger, 105, was in the survivor, there would be no legal right to abate the suit The law of Tennessee then, which rests upon authority, reason, and practice is, that in all cases the right of action under a contract, which one has at his death, survives to his representatives, and that the suit should be in the name of such representatives alone, or jointly, with the other parties plaintiff if there be any Partners constitute an exception to the general rule, and if one dies the survivor alone sues for the partnership debts, as at the common law[84] In some cases the heir must sue and not the administrator or executor of the deceased party. Thus, if the suit is to be upon a contract for the payment of rent, and the rent falls due after the death of the landlord, the heir to whom the land has descended, and not the representative, must sue; so upon a warranty of title to land which the heir inherits, although the covenant is broken in the lifetime of the ancestor, yet if the *eviction* take place after his death, the heir and not the representative must sue.[85] Touching the action for rents above referred to, the law in Tennessee has been somewhat modified, so that if a life tenant should lease his

83 § 3564, M & V
84. §§ 2818, 3564, M. & V.
85. 1 Chit Pl. 19, 21

lands and die before the termination of the lease, leaving rents unpaid, they are apportioned, and the executor or administrator, in his own name, may recover the ratable part of the rents accruing up to the death of the life tenant, and the remainderman would be entitled to sue for and recover that part accruing after.[86]

If the right of action arise out of injuries done to personal property, all the joint owners of it should sue as hereinbefore stated, and if one of the joint owners die his representative should join with the survivors. Of course, if one be the sole owner of personal property which is taken or injured, and he dies, his administrator or executor should sue for the wrong.[87] But it was said at the common law that while the heirs could sue to recover the possession of land descended to them from the ancestor, still if a mere *injury* were done to real property in the lifetime of the ancestor, neither the heirs, executor, nor administrator could sue.[88] This rule presented a case of wrong, for which there was no redress, because technical rules would not allow the injured party to sue, and it was the law of Tennessee until the Act of 1877, chap. 111, changed the rule so that now the representative may sue for injuries done to real estate in the lifetime of the owner.[89]

Upon the subject of injuries to person and character, it has already been stated that the general rule is, that the action can be brought only in the name of the person immediately injured. It would follow naturally from this rule that if the injured person died the right of action would die also, and this is strictly the rule of law in all actions for injuries to *character,* for if the injured person dies before suit, no one can institute it, and if his death occur *pendente lite* the suit shall abate;[90] and in the case

86. Shan. Code, § 4184.
87. 1 Chit Pl 69
88 1 Chit Pl. 69
89. § 4145, M & V.
90. § 3560, M. & V.

of injuries to the person if the injured party dies *before suit is brought,* the right of action dies with him, *except in one case,* and that is *where he dies from the injury inflicted on his person*[91] The law then on the subject of injuries to person is, that if the injured person institutes a suit for the wrong and dies *pendente lite,* it may be revived as in other suits in the name of the representative,[92] or it may proceed *without revivor*[93] as a suit for the use of the widow and next of kin who are entitled to the recovery.[94] If he *dies from the injury received* and *before the institution of suit,* the representative may sue, and if he refuse to do so, the widow and children may, without the consent of the representative, use his name or their own in bringing and prosecuting the same.[95] If the injured party dies *before the bringing of suit,* and not from the injuries received, the right of action dies with him[96]

8. THE ACTION.

It will be seen that the writ gives no name to the action, and does not show what the suit is for It only requires the defendant to appear and answer the "*action*" of the plaintiff. Whether the action be for debt, slander, or trespass is not disclosed. The plaintiff might have briefly stated in the writ the *cause of action,* but it is not necessary for him to do so.[97]

When the defendant appears in court under the summons, the plaintiff will then have to state in the form of a declaration the cause for which he has sued the defendant, and then the defendant will know what it is he has to answer. The damages laid (or *stated* or *alleged* to have

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91. § 3130, M. & V. 92 § 3560, M. & V.
93. § 3133, M & V.
94. § 3130, M. & V , 19 Pickle, 347
95. §§ 3331, 3332, M & V. These sections do not apply to the killing a husband and father alone, but include every case of wrongful killing 8 Lea, 100
96. 1 Chit. Pl 61. 97. §§ 3520, 3521, M. & V.

accrued to the plaintiff by reason of the wrongful act of the defendant) in the writ are one thousand dollars. This is a matter entirely in the control of the plaintiff He may lay them in any amount he pleases. It is only important that he should lay them high enough to cover any amount he may likely show himself entitled to recover; for, as a rule, he cannot recover a greater amount of damages than that laid in the writ. He may and generally does recover less, but never greater. If the plaintiff were suing for a debt of one thousand dollars, the damages laid in the writ might properly be stated at twelve hundred or fifteen hundred dollars, or any sum which would certainly cover the debt and accrued interest.

9. THE TESTE.

Is the last thing to be considered in the analysis of the writ. It is simply defined to be the concluding part of a writ giving the date and place of issuance[98] This would have been a better definition some centuries ago than now. It conveys at this day a very imperfect idea of what is now meant by the teste of a writ. The teste of the writ which is the subject of this analysis is to be found in the following words: "Witness my hand, this first Monday in January, 1888 W W. Donnell, Clerk" This, it is true, is the concluding part of the writ, but it has long ago ceased to be *the date* of its issuance. It is only a fictitious date and has reference to a rule which prevailed when original writs were first resorted to. In leading process, that is, in writs of summons and original attachments from courts of record, it has no other effect than to attest or certify the genuineness and official character of the paper. Origi-

98. See the word in Bouv Law Dict, and in Rap & Lawr L Dict The word *issuance* is synonymous with the words "granting, suing out" It is frequently used improperly to indicate the act of delivering the process to the party asking for it, or to the executing officer

nally the plaintiff was compelled to make application for his writ at a time fixed by law to the king, or to his chancellor, who was the keeper of the king's conscience, and whose court was called *officina justitiæ,* the shop or mint of justice, wherein all the king's writs were framed.[99] And the suitor presenting a case entitling him to relief and paying the required fees, received the writ, which was drawn out in proper form by the chancellor and *tested* or *witnessed* in the king's name, with time and place. This testing or witnessing did in fact show the true date of the issuance or granting of the writ, but it also served the necessary purpose of giving validity to the process by attesting its genuineness. Clinging to the forms of ancient days, though much of the reason and substance be gone, writs are still required to have a teste, and in Tennessee the Constitution, section 12, article VI, provides that all writs and process shall bear teste, and by statutory enactment "all process issued from any of the Circuit Courts of this State, and returnable thereto, shall be tested of the term next preceding the issuance"[1] This destroys the idea that the teste is the date of issuance or suing out. Writs may be and are constantly sued out one, two, or three months after the adjournment of a term, and yet they bear teste of that preceding term, and by another fiction[2] the teste is as of the first day of that term.

The statute is silent as to the teste of leading process from Courts of Chancery and County Courts, but by uniform practice they bear teste as of the first day of the term preceding their actual issuance. As a justice of the peace has no stated terms of court, the teste of leading process sued out before him would be the day upon which he actu-

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99. 3 Bl Comm 272

1. § 3533, M & V The case of Lyle *v* Longley seems to hold that the constitutional provision referred to in the text, has no reference to attachment writs issued by judges 6 Baxt 286.

2. 3 Bl. Comm 281.

ally granted it and prepared the paper. It must be remembered again that *teste,* as applied to leading process in courts of record, is only the attestation or witness of the genuineness or official character of the paper. In addition to the teste, the law requires that all process shall have marked thereon the actual day it was granted or sued out.[3] The teste of an execution, which is final process, is of greater significance and importance. That will hereafter be considered under its appropriate head.

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3 § 3524, M. & V.

CHAPTER III.

PROCESS FURTHER CONSIDERED, AND HOW EXECUTED.

Having considered in the last chapter the original summons as the usual and ordinary means for the commencement of an action at law, it remains for this chapter to consider a few actions in which the manner of instituting them is somewhat peculiar, and then to discuss briefly the duties of the sheriff or other executing officer in relation to process generally that comes to his hands from the courts of law.

The first case to be noticed is the action of

EJECTMENT.

§ 1. In Tennessee this is a real action, that is, an action in which the plaintiff claims title to land.(*a*) Any person having a valid subsisting legal interest in real property, and a right to immediate possession thereof, may recover the same by an action of ejectment. The action is commenced by *summons and declaration,* in which the name of the real claimant is used as plaintiff, and the actual occupant of the land, if any, and if not, then any person claiming an interest therein, or exercising rights of ownership over it, is defendant. It will be observed that the action is commenced by *summons and declaration,* while the ordinary action is commenced by *summons* alone. This difference makes the action of ejectment peculiar. The practice is that the attorney for the plaintiff, as the first step, prepares the declaration (the form and meaning of which will be discussed when that subject is reached), and taking it to the clerk of the Circuit Court, to be filed,

(*a*) Hess *v.* Sims, 1 Yerg. 143.

he will then in the usual manner obtain the summons. In this action the plaintiff's right of recovery depends upon the *strength of his own title,* and not upon the defect in the title of the defendant. The defendant may in fact have no title at all, but if he shows the better legal title to be in any one else than the plaintiff, he succeeds.[1]

REPLEVIN.

§ 2. The next action, peculiar in its character, which is to be noticed, is the action of *replevin,* which the owner of *goods* or *chattels* may bring for their recovery, whether the defendant originally obtained the possession of them wrongfully, or, having obtained them in the first instance rightfully, wrongfully detains them.[2] If the plaintiff does not wish to obtain the goods or chattels until he has obtained a judgment for them, he would then bring another action called *detinue,*[3] which is commenced and carried on as any other ordinary action But if he wants to obtain *possession* of the articles sued for at the *commencement* of his suit, he brings replevin.[4] In this action his first step is to file an affidavit with the justice of the peace or the clerk of the court, without which he cannot proceed[5] The simplest definition that can be given of an affidavit is that it is a statement of alleged facts, reduced to writing, and signed and sworn to by the party making it before some officer authorized to administer an oath. This affidavit must be sworn to by the plaintiff, his agent or attorney, before the justice of the peace or the clerk of the court, and it must contain the following statements:[6] *First* — That according to affiant's information and belief he (or the plaintiff) is entitled to the possession of (here describe

1. Garner *v* Johnson, Peck, 24, Miller *v* Holt, 1 Tenn 51; Simms *v* Love, 9 Wheat 515
2. § 4110, M & V , 2 Swan, 363, 1 Head, 17.
3. § 3443, M & V
4. § 3443, M & V
5. § 4112, M & V.
6. § 4112, M & V.

with reasonable certainty the property proposed to be replevied). *Second* — That the defendant has seized (or detained) the same *Third* — That said property was not subject to such seizure (or detention). *Fourth* — That he (or the plaintiff) demands a writ of replevin.

The affidavit may be in the following form:

Affidavit.

A B makes oath, that according to his information and belief, he (or the plaintiff) is entitled to the possession of a certain black horse, about sixteen hands high, and six years old, that C D has seized (or detains) said horse wrongfully and without authority Therefore, he (or the plaintiff) demands a writ of replevin

A. B.

Sworn to and subscribed before me, August 10 1888

W. W. DONNELL,
Clerk

This affidavit, being made and delivered to the officer before whom the oath was taken, which, as has been seen, may be the clerk of the Circuit Court in which the suit is to be brought, or any justice of the peace, the law then requires that the plaintiff shall, at the same time, give bond in double value of the property sued for, payable to the defendant, and conditioned to be void if the plaintiff shall abide by and perform the judgment which the court may render in the suit.[7] This bond is called the replevin bond, and is intended primarily to secure the return to the defendant of the property replevied, in the event the plaintiff fails. But it is also a cost bond, and if the plaintiff is unsuccessful in his suit, and fails to return the property and pay the cost, judgment for both may be had on this bond against him and his surety.[8] It is the duty of the clerk or justice to estimate the value of the property sued for from the description of it in the affidavit, and thus determine the amount for which the

7. § 4113, M & V. 8. § 4133, M. & V.

bond should be taken. The bond may be in the following form:

We, A B and E F, acknowledge ourselves indebted to C D in the sum of four hundred dollars, to be void on condition that the above-mentioned A B shall abide by and perform the judgment of the court in the action of replevin which he is about to commence in the Circuit Court of Wilson county (or before R L C White, a justice of the peace for Wilson county), for one black horse

This August 19, 1888

A B,
E F,
Surety

Having made the affidavit, and given the bond the plaintiff is entitled to the writ.[9] This writ is in effect something more than a writ of summons, and differs in form from that given in the last chapter. If the suit is brought in the Circuit Court, the writ may be in the following form:

THE STATE OF TENNESSEE.

To the Sheriff of Wilson County:

Summon C D to appear before the Circuit Court of Wilson county, to be held at the courthouse in Lebanon, on the first Monday in September next, to answer A B, wherefore he detains from him a certain black horse, about sixteen hands high, and six years old, the property of the said A B, and you will also take said horse out of the possession of the said C D, and deliver him to the said A B.

Witness my hand this, the first Monday in May, 1888

W. W DONNELL,
Clerk

The marked difference between this writ and the one heretofore given lies in the fact, that this one gives to the defendant notice of the cause of action, the former one does not, and in addition, this directs the sheriff to take the thing sued for out of the possession of the defendant, and deliver it to the plaintiff, thus giving to the plaintiff the extraordinary relief of receiving at the inception of the suit the contemplated fruit of the litiga-

9 § 4115, M. & V.

tion, which, in the ordinary course, comes only after judgment. In order that the sheriff may know with reasonable certainty what he is to take and deliver to the plaintiff, it is described in the writ, and the description should substantially agree with that in the affidavit. The clerk has no power to issue a writ for any other article than that described in the affidavit, and hence, for this reason, as well as for the protection of the sheriff, the description in the writ should accord with that of the affidavit. If the suit is brought before a justice of the peace, then the writ may be in the following form.

THE STATE OF TENNESSEE

To the Sheriff, or any Constable of Wilson County:

Summon C D to appear before me, or some other justice of said county, to answer the complaint of A B for unlawfully detaining from him a certain black horse, about sixteen hands high, and six years old, the property of the said A B, and you will also take said horse out of the possession of the said C D, and deliver him to the said A B, he having given bond and security as required by law.
This August 19, 1888

R L. C WHITE,
Justice of the Peace.

The words "to appear before *me, or some other* justice," etc., make the writ conform to the rule of law which allows one justice to issue the process, and any other justice in the county before whom the officer may return it, to try the cause This rule also makes necessary the last statement in the writ: "he having given bond and security," etc. No justice in the county would have jurisdiction of the cause unless the bond and security be given, and as the writ *may* be returned before some other justice than the one who issued it, and took the bond and security, and therefore one who has no knowledge of the fact, it is proper to add this statement as a certificate that this requirement of the law had been complied with. In no other material matter does the form of this writ differ from the

preceding form given for the Circuit Court. But there are differences in the form here given for justices, and that given in the Code, which it is proper to refer to. That in the Code is preceded by the following statement. "the following shall be the form of the writ:"

The word "shall" is not always used in the *compulsory* sense; it has often the effect of *may,* and it is believed to be used in the sense of "may" in this section.[10] The form given in the Code would not be appropriate where the possession of the thing sued for was obtained rightfully, nor where the possession had never been in the plaintiff. The language is "*for unlawfully taking out of his* (the plaintiff's) *possession, and detaining from him,*" etc An action of replevin may be brought for a chattel which was never actually or constructively in the possession of the plaintiff, and there may be an action of replevin where the taking was lawful and the detention only unlawful By judicial construction of the Code, the word "and" will no doubt be held to mean "or," else the form given provides for but a single case of replevin, that is, where there has been an *unlawful taking coupled with an unlawful detention.* Again, the form given in the Code begins thus: "I command you," etc., and in a subsequent part of it the same expression is used: "I command you to take said property," etc The writ in the form is properly signed by the justice of the peace, and by all rules of construction the use of the personal pronoun "I" makes the writ the *command of the justice.* The Constitution of the State provides, "that writs and other process shall run in the name of the State"[11] This means that the authority of process is derived from the State, and the command which it contains is the command of the State, and

10. § 4131, M & V, Farmers', etc, Bank *v* Johnson, 2 Humphr 27

11 Const Tenn, art VI, § 12, Mayor & Ald *v* Pearl, 11 Humphr 249, 8 Pickle, 525.

not of the particular officer who happens to issue it. It is evident that the form in the Code was not drawn with care, still it is made good by positive enactment. The form given above conforms more nearly to usage and to principle.

ORIGINAL ATTACHMENT.

§ 3. There remains to be noticed one other mode out of the ordinary course by which a suit may be commenced, and that is by the use of the *writ of attachment.* There are three kinds of writs of attachment against property, and for convenience all will be noticed here, although a part of what will be said may be somewhat out of the regular order. They are as follows:

First The original attachment, which is that by which a suit is commenced.

Second. The judicial attachment, which issues after the writ of summons has been returned, "not to be found in my county" In such a case the plaintiff may have an *alias* (another) summons, or the judicial attachment.

Third The ancillary attachment, which issues in cases where the suit has been commenced by summons, and at the time of the issuance of the summons, or at any subsequent time in the progress of the suit the plaintiff obtains an attachment against the property of the defendant

These several writs in the order named will be briefly discussed. Suits by original attachment may be brought in any court, or before any justice of the peace having jurisdiction of the cause of action [12] It is not meant by this statement that the plaintiff has his election in every case to begin his suit by summons or original attachment.

The statute has, with great particularity, enumerated the grounds which will justify a departure from the ordinary course of law, and if the plaintiff wishes to use the *extraordinary* process of attachment, he must show that

12 § 4198, M & V.

one or more of these grounds exist in his case. The causes which will justify the issuance of an original attachment in Tennessee are not of an unusual character, and they are substantially those of other States

The regulations in Tennessee are substantially as follows:

Any person having a debt, whether due or not (unless the debtor be a nonresident, and the ground for the attachment is *nonresidence* alone, in which case the debt must be due),[13] or having a claim for damages for a tort, may commence his action by original attachment in the following cases:[14]

1. Where the debtor or defendant resides out of the State.[15]

2. Where he is about to remove or has removed himself or property out of the State.

3. Where he has removed or is removing himself out of the county privately.

4. Where he conceals himself, so that the ordinary process of law cannot be served upon him.

5 Where he absconds, or is absconding, or concealing himself or property.

6. Where he has fraudulently disposed of, or is about fraudulently to dispose of his property.

7. Where any person liable for any debt or demand, residing out of the State, dies leaving property in the State.

The attachment may be granted by any judge of the circuit, criminal, or special court, by any chancellor or justice of the peace, or by the clerk of the court to which the attachment is made returnable.[16] When the plaintiff

13. Merchants' Nat. Bank *v* McCargen, 9 Heisk 402, Shan Code, § 5213.

14. § 4192, M. & V.

15. A person may be a citizen and yet a nonresident of the State in the sense of the attachment laws 3 Tenn Ch 131

16 § 4202, M. & V

in a suit demands only the ordinary process of the law, and gives security for the costs, he has to furnish no evidence of the justness of his claim. But when he seeks the use of extraordinary process, he must swear to the justice of his demand This we have seen in the action of replevin, where he seeks by his writ to get possession of the property before it is determined by the judgment of the court that he has any right to it. So to obtain an original attachment, the plaintiff, his agent, or attorney, is required to make an affidavit to the following facts:

1. The nature of his debt or demand, as that it is by note, account, for breach of contract, etc.

2. The amount of it

3 That it is just.

4 That one or more of the causes for issuing attachments above named exist.[17] It is sufficient that the statements contained in the affidavit be made to the best of the affiant's knowledge and belief.[18] The affidavit may be in the following form·

Affidavit.

STATE OF TENNESSEE — WILSON COUNTY

A B makes oath (or C D, agent or attorney of A B), according to the best of his knowledge and belief, that E F is justly indebted to him (or to the said A B) five hundred dollars by note (or damages for breach of warranty, or for assault and battery, etc), and that the said E F. does not reside in this State (or that he has fraudulently disposed of his property, etc.)

A B (or C D, agent of A. B)

Sworn to and subscribed before me, August 21, 1888.

R L C WHITE, *J. P.*

The plaintiff's next step in commencing his suit is to give a bond in double the amount claimed to be due, with sufficient security, and payable to the defendant, which may be in the following form:[19]

We, A B and C D, acknowledge ourselves indebted to E F in the sum of one thousand dollars, to be void if the said A B shall

17. § 4210, M & V
18. 5 Pickle, 466, 5 Baxt 584.
19. § 4212, M & V.

prosecute with effect an attachment against the estate of the said E. F. this day obtained from R. L C. White, a justice of the peace for Wilson county, returnable to the Circuit Court of said county; or if he fail to do so, shall pay the defendant, E. F., all costs that may be adjudged against the said A B., and also all such damages as the said E. F. may sustain by the wrongful suing out of said attachment.

Witness our hands this August 21, 1888.

A. B,
C. D.,
Security.

Upon this bond being given, the writ issues to the sheriff — which, by express enactment, may be in the following form:

STATE OF TENNESSEE — WILSON COUNTY.

To the Sheriff of Wilson County, Greeting.

Whereas, A B hath complained, on oath, to me, R. L C. White, justice of the peace, that E. F. is justly indebted to the said A. B. in the sum of five hundred dollars; and affidavit having also been made in writing, and bond given as required by law in attachment cases; you are hereby commanded to attach so much of the estate of the said E F. as will be of value sufficient to satisfy the debt and costs according to the complaint, and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon, to be had at the Circuit Court to be held for the county of Wilson, on the first Monday in September next, when and where you will make known how you have executed this writ

Witness, R. L C White, justice of the peace, this August 21, 1888

R. L. C. WHITE,
Justice of the Peace

This writ, it will be observed, is tested as of the date of its issuance. This would, ordinarily, be explained by the fact that it is issued by a justice of the peace, who has no stated terms, and writs issued by him would necessarily bear teste as of the real date of issuance. But this writ is made returnable to the Circuit Court, and it could, with propriety, have been tested as of the preceding term of that court — but the form which is copied from the Code does not make this necessary, and the adjudications incline to the view that attachments issued and returnable, as this one, are not included among the "writs and other process" provided for in the Constitution, art. VI, § 12.[20]

20 See 6 Baxt 286, 2 Coldw. 153.

It will also be observed that the only command of the writ is to attach the property of the defendant, and hold it, unless replevied, subject to the future orders of the court. The sheriff is not directed to give the defendant notice, nor in this case does the law treat the attachment of his property as either actual or constructive notice. The return of the writ, then, properly executed, would not confer on the plaintiff the right to proceed to trial and judgment The law therefore requires that, as soon as the attachment has been levied on the property of the defendant, publication shall be made for four consecutive weeks in a newspaper published in the county in which the suit is brought, if any — and if not, in some convenient newspaper, to be designated in the order, the last publication to be at least one week before the time fixed for the defendant's appearance.[21] The order for this publication shall be made by the officer granting the attachment; and if not by him, then by the clerk of the court, the court itself, or the justice before whom the attachment is returned.[22] The publication shall contain the names of the parties, the style of the court to which the attachment is returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit.[23] The following form of publication will show what is to be the substance of it:

Attachment Suit.

A. B
v. } CIRCUIT COURT OF WILSON COUNTY, TENNESSEE.
C. D

The plaintiff, A B, having obtained from R. L C White, a justice of the peace, an original attachment, returnable to the September term, 1888, of the Circuit Court of Wilson county, Tennessee, against the estate of defendant, C D, upon affidavit of the said

21. §§ 4259, 4264, M. & V
22 §§ 4259, 4260, M & V
23. § 4263, M & V As to what the publication should contain, see Riley *v* Nichols, 1 Heisk 16, Howard *v.* Jenkins, 5 Lea, 176, Bains *v* Perry, 1 Lea, 39.

plaintiff, that the said defendant was justly indebted to him, and was a nonresident of the State (or, was fraudulently disposing of his property, etc), and said attachment having been levied upon defendant's property, and an order for publication having been made by the court (or, clerk) , now, therefore, in pursuance of said order, this publication is made, and the said defendant, C D , is required to appear before said Circuit Court, at the courthouse in Lebanon, on the first Monday in September next, and make defense to said attachment suit, or the same will be proceeded with *ex parte*.

W. W DONNELL,
Clerk.

The attachment *and publication* are in lieu of personal service of process upon the defendant, and the plaintiff, having taken these steps (the attachment being duly levied), may proceed with his suit the same as if the defendant had been brought before the court by the service of ordinary summons.[24] But the condition of the plaintiff is much better than it would have been had he commenced his suit by summons, for his attachment and publication have not only brought the *person* of the defendant within the jurisdiction of the court, but his property also — that upon which the attachment is levied — which will be retained under the control of the court for the satisfaction of any judgment which the plaintiff may obtain. The right of the defendant to replevy the property attached, which right is provided for on the face of the attachment writ, will be considered in the chapter on EXECUTIONS.

Formerly jurisdiction of the defendant was acquired by the court in such cases by publication only, but now by the Act of 1871, which is embodied in sections 4203, 4204, M. & V. Code, the issuance of a summons at the same time of the issuance of an original attachment is allowed. The object of this new rule was evidently to escape the expense and delay incident to publication, for the act directs that if the summons is served on the defendant, then there shall be no publica-

24. § 4265, M & V

tion and no stay of judgment as now required by law in attachment cases. Of course, if the summons was not served, the case would proceed as in any other suit by original attachment. But if the attachment is levied, and the summons served on the defendant, then which becomes the *leading* process? It would seem that it was the intention of the legislature to give preference to the attachment, and the suit should continue as an original attachment suit, the summons performing the office of a mere notice to the defendant of the proceeding, and requiring him to appear and defend the attachment suit, it being in form more like a subpœna to answer than a summons. But this question has been settled otherwise, it being held that if the summons is served it becomes the leading process, and the attachment, if levied, takes position equivalent to an ancillary attachment.[25]

ANCILLARY ATTACHMENT.

§ 4. An *ancillary attachment* is sued out in aid of a suit already brought.(*a*) Its only office is to hold the property attached under it for the satisfaction of the plaintiff's demand. It does not bring the party into court. It is said in actions *ex delicto* it may issue simultaneously with the summons.[26] Still, in legal contemplation it must be held to follow the summons — though it be issued the same day with the summons and the same hour of the day. It is essential to state in the affidavit and writ that a suit is pending against the defendant, and that the attachment is in aid thereof.[27]

This writ will issue in any case authorizing the issuance of an original attachment, and is obtained in the same way, that is, upon affidavit and bond. It must be

25 Bivens *v* Matthews, 7 Baxt. 256 (*a*) §§ 4201, 4192, M & V
26 Walker *v* Cottrell, 6 Baxt 257.
27. Walker *v* Cottrell, 6 Baxt. 257, Thompson *v.* Casper, 11 Humphr. 542

stated in the affidavit and in the attachment that a suit has been commenced by the plaintiff against the defendant, the nature thereof, in what court, the amount claimed, and that the cause of action is just.[28] It must also contain the statement that one or more of the causes enumerated heretofore exist as grounds for the issuance of the attachment.[29]

The following form of affidavit seems to contain every essential statement:

Affidavit.

A B
v
C D

A. B. makes oath to the best of his knowledge and belief that C D is justly indebted to him in the sum of one thousand dollars due by note (or as damages for an assault and battery), that he has commenced a suit against the said C D, on said note, for the recovery of said one thousand dollars (or that he has commenced a suit against the said C. D, for the recovery of said one thousand dollars as damages for said assault and battery) in the Circuit Court of Wilson county, Tennessee, where the same is now pending, and that the said C. D is about to remove himself from the State (or is about fraudulently to dispose of his property, etc). Affiant therefore asks in aid of his said suit that an ancillary attachment issue against the estate of the said C. D. A B

Sworn to and subscribed before me, this 22d August, 1888
W. W. DONNELL,
Clerk.

The form of bond, given in the case of original attachment with very slight changes, will be sufficient in the case of an ancillary attachment. The ancillary writ of attachment must contain all the essential statements of the affidavit.

The following form of such writ is deemed sufficient:

THE STATE OF TENNESSEE

To the Sheriff of Wilson County:

Whereas, A B. has complained to me on oath that C D. is justly indebted to him in the sum of one thousand dollars, due by note (or, etc.), that he has commenced a suit against said C D on said note,

28. Woodfolk *v.* Whitworth, 5 Coldw. 561; 4 Sneed, 453, 3 Coldw 140

29. § 4210, M & V.

for the recovery of said one thousand dollars (or, etc), in the Circuit Court of Wilson county, Tennessee, where the same is now pending and that the said C. D is about to remove himself from the State (or, etc), and, whereas, the said A B has given bond as required by l. in attachment cases, and asks the issuance of an ancillary attachment in aid of his said suit against the estate of the said C D This, therefore, is to command you to attach, etc [proceeding as in the original attachment writ down to the teste and then (as this writ is issued by the clerk of the court, and should bear teste as of the preceding term) conclude as follows]

Witness my hand this first Monday in May, 1888

W. W. DONNELL,
Clerk

JUDICIAL ATTACHMENT.

§ 5. The *judicial attachment* may issue in any civil action whatever, whether founded on tort or contract, where a summons is returned "not to be found in my county."[30] This return implies that the defendant is an inhabitant of this State at the time of the institution of the suit, that his residence is in the county in which the suit may have been commenced, and that he evades the service of process.[31] A return "not found in my county" will not authorize the issuance of the writ The statute is imperative: the return must be, "not *to be* found in my county."[32] The issuance of the writ is ordered by the court upon motion based on this return — no affidavit is required, and no new bond. The form of the writ is the same as the original attachment, except in the recital of the ground on which it is issued. After the writ issues, the proceedings are the same as on the original attachment, and, after its return, levied on the property of the defendant, the cause proceeds against the defendant in all respects as if originally commenced by attachment The judicial attachment and publication perform every office of the original attachment and

30. § 4207, M & V

31. James *v.* Hall, 1 Swan, 297, 1 Pickle, 165

32 Welch *v.* Robinson, 10 Humphr 264; Grewar *v.* Henderson, 1 Tenn Ch 76

publication. Each brings the defendant within the jurisdiction of the court, and each secures the property of the defendant for the satisfaction of the plaintiff's demand The judicial attachment is not, however, the leading process — it does not begin the suit The suing out of the original summons was the commencement of the suit, and, in all questions of time affecting the rights of the parties, the date of the issuance of the summons would control. The relation of subsequent or *alias* process to the original process will continue, and the suit will be held to have been commenced by the original or first leading process, so long as the issuance of *alias* process is continued regularly from term to term; but, if a term is omitted, the hiatus thus created breaks the connection and the benefit of the relation to first process is lost. (*a*)

SUITS BEFORE JUSTICES.

§ 6. It has heretofore been stated that the issuance of a summons by the clerk is the commencement of a suit in the Circuit Court, whether the process be served by the sheriff or not The issuance of the warrant, which is the name given the summons when issued by a justice, is not of itself the commencement of suit. The action is not, in legal contemplation, commenced until the warrant is served on the defendant (*b*)

The justice of the peace court is not a court of record, that is, he keeps no minutes in the true sense of that term, and the pleadings are, as a rule, *ore tenus*. There are no regular terms of his court He is not required to have a fixed place for the trial of causes, but his *courthouse* or office is anywhere in the county where he may be found or performs an official act. The suitor must "*hunt him up*," and make personal application for the process Ex-

(*a*) § 3448, M & V. (*b*) 2 Coldw 47.

cept in certain cases the justice is not bound to require a bond for cost, or the pauper oath before issuing the process, though he may in any case require the one or the other [33] The excepted cases are actions of replevin, suits begun by attachment, actions for forcible and unlawful entry and detainer, for false imprisonment, malicious prosecutions, and slanderous words.[34] In all these excepted cases the justice as well as the clerks of courts are without discretion, and *must require a bond.* But in all other cases the justice may issue the process without requiring the bond for costs, or the taking of the pauper oath The ordinary warrant issued by the justice differs in one material respect from the summons issued from the Circuit Court. Its form, as fixed by the statute, is as follows.

STATE OF TENNESSEE — WILSON COUNTY

To any lawful officer to execute and return

Summon A B to appear before me, or some other justice of the peace for said county and State, to answer C D in a civil action upon a note (or account, or otherwise, as the case may be), under . dollars, this day of , 188

R L C. WHITE,
Justice.

The writ of summons issued from the Circuit Court does not in any way state the cause of action, nor is it required to do so by the law The justice's warrant does state substantially the cause of action, and the law requires that it should do so This is the respect above mentioned in which they differ. There is no *declaration* that follows the justice's warrant, as in the case of the Circuit Court summons, and therefore, unless the warrant contained some statement of the cause of action, the defendant might never know what he was sued about until the plaintiff opened the trial of the case, and that would be too late for him to get

33 §§ 2818, 4919, M & V.
34. §§ 4079, 4113, 4212, M. & V.

his witnesses and make ready his defense. The warrant from the justice serves the double purpose of process and pleading, it brings the defendant into court, and tells him what he is brought there for. The summons from the Circuit Court only brings the defendant into court, where he must await the filing of the plaintiff's declaration to learn what the plaintiff demands of him The statement of the cause of action in the justice's warrant need not be very particular It is only required that it shall be a substantial statement of the plaintiff's cause of action, as "to answer C D in a civil action for taking away his colt," [35] "killing his cow," [36] "throwing down his fence," [37] "breaking open his house," [38] or "not grinding his corn in turn," [39] and the like. These are sufficient statements of the cause of action.

SERVICE OF PROCESS.

§ 7. Having with as much brevity as practicable, to leave the subject perspicuous, detailed the steps to be taken by the plaintiff in procuring process for commencing a suit, it remains to give some account of the duties of officers of the law in *serving* or *executing* and *returning* it As before stated, the *suing out* a summons is the commencement of the suit in all courts of record. This applies as well to attachment cases — suing out the writ of attachment is the commencement of the suit A writ, whether it be ordinary or extraordinary in character, is *sued out*

1. When the party asking for it has done all the law requires him to do to entitle him to it, as giving bond for costs, making affidavit, etc.

2. When the proper officer has drawn out the process in form and attached his name officially to it.

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35. 5 Yerg 269
36. 5 Yerg 269
37. 5 Yerg 269.
38 5 Yerg. 269
39 Kirby v Lee, 8 Yerg 439.

When these two things are done the suit is commenced. It is made the duty of the clerk of the court to indorse on the back of the summons and of all other process issued from his court *the date of issuance.*[40] The word "issuance" is synonymous with *suing out,*[41] and the meaning of this requirement of the law is that it is made the duty of the clerk to indorse on the back of the writ the day it was *sued out.* This is an important ministerial act of the clerk. The writ on its face does not show when it was sued out, and hence does not show *when the plaintiff commenced his suit,* a fact which may be and frequently is of the utmost importance to him. The indorsement of the clerk on the back of the writ is made evidence of that fact.[42] The failure of the clerk to make this indorsement subjects him to a forfeiture of one hundred and twenty-five dollars, which is recoverable by any person who may sue for it.[43] The clerk, no doubt, would be liable to the plaintiff for any special damages which might result from such an omission of duty.

It is just above stated that the indorsement of the clerk is evidence of the true date of suing out the writ or commencement of the suit. But it is not to be conclusive evidence against or in favor of either party. If the clerk should, from negligence or for other improper reason, date his indorsement one day later than the true day upon which the writ was sued out, and by reason thereof it appeared to have been issued on Sunday, or that the statute of limitations had intervened to cut off the plaintiff's remedy, the plaintiff would not be estopped in answer to a plea in abatement, or to the plea of the statute, or in an action against the clerk, to show the true date, although in each case the indorsement as made by the clerk would

40. §§ 3524 4816, M & V.
41. 19 Wend 49
42 Helm v Rogers, 5 Humphr 105 In this case it seems to have been held evidence on a plea in abatement.
43. § 3524, M & V.

be taken as *prima facie* true for the defendant. In this connection it may be stated that the law does not ordinarily allow a party to institute his suit on Sunday. But if the plaintiff, his agent, or attorney, make oath that the defendant is removing or about to remove himself or property beyond the jurisdiction of the court, it is lawful to grant process on that day It is made the duty of the clerk or justice to indorse on the back of such process that it was obtained on the oath of the plaintiff, his agent, or attorney. And when so obtained and indorsed, it may be executed by the sheriff or other proper officer on Sunday.[44] And, without regard to the day of issuance, if the sheriff have process in his hands, and it shall appear to him that the party sued is about to leave the county or State, he may execute the process on Sunday.(*a*) The clerk of the court should keep an appearance docket, on which he should enter every case at the time of its institution This is not expressly required by the law, but as a matter of practice it is important. This docket should show the names of the attorneys for the parties, name and residence of the parties to the suit, name of the plaintiff's security for costs, when the writ was sued out, and what return was made by the sheriff or other officer. When the clerk has properly indorsed the writ, he may then deliver it to the plaintiff, or his attorney, and he delivers it to the sheriff or to the officer to whom it is addressed The common practice is for the plaintiff to leave the writ in the keeping of the clerk, who assumes the duty of delivering it to the officer His failure to do this would be no official default, as there is no law requiring him to deliver process into the hands of the sheriff. The plaintiff could only look to him as a private agent

When the sheriff receives the writ it is made his duty to indorse on it the day it came to his hands, thus: "Re-

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44 § 3529 *et seq.*, M & V (*a*) Shan Code, § 4532

ceived August 22, 1888 W. P. Bandy, Sheriff" From this indorsement it will appear whether he had sufficient time to execute and return the writ according to its command. He is liable to a penalty of one hundred and twenty-five dollars for neglecting this duty, recoverable by any one who may sue for it.[45] This duty is imposed upon the sheriff without reference to the kind of process or the court from which it issues. In the service or execution of process, it is required that the sheriff use a degree of diligence exceeding that which a prudent man employs in his own affairs.[46] If the command of the writ is to summon the defendant, he must see the defendant personally, and read the writ to him, or offer to do so, and if he will not hear it, that is service enough.[47] It will not do to send word to the defendant, or write to him, or leave a copy of the writ at his house He is not allowed to return the writ, "not to be found in my county," unless he has actually been to the residence of such defendant in search of him.[48] And if he ascertains that the defendant is a known inhabitant of another county, it is made his duty to return that fact.[49] If there are several defendants all must be served Where husband and wife are sued, both must be summoned. Where an infant is sued, he must be summoned, however young. If he were in his cradle the service on him would give notice to his friends, and induce some of them to see to his defense. If the disability of the defendant proceeds from unsoundness of mind, the same rule prevails, personal service is necessary.[50]

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45 § 3524, M & V

46 § 4868 M & V, 6 Pickle, 243

47 § 3534, M & V

48 § 421, M & V

49 § 422, M & V

50. In courts of chancery the rule requiring service on a minor, if there be a regular guardian, is dispensed with Indeed it is said courts of equity were never bound by such a rule Section 3098, M & V, by its express terms, requires service on the minor and guardian also when the proceeding is to subject lands of deceased persons by *scire facias* against the heir to the payment of debts But,

If the defendant is a corporation, and the suit is brought in the county in which it keeps its chief office, the service of the writ shall be: (1) on the president; (2) cashier; (3) treasurer; (4) secretary; and in the absence of any such officers, then on any director of said corporation. But if the suit is brought in some other county than that of the chief office, and the corporation has any office, agency, or resident director in such other county, then service may be had on any agent or clerk in said county who is employed in the business of said corporation.[51] If a county is a defendant, the service of process will be made on the chief officer of the County Court.[52] Witnesses and jurors, while attending court under legal summons, and electors (except for treason, felony, or breach of the peace), while attending elections, are exempt from personal service of process. The word "attending" includes the time necessary for going to and returning from the court or election.[53]

So far, process requiring only personal service has been noticed. The writ may require something else to be done, as in the case of the writ of replevin, the sheriff is to take the property sued for and deliver it to the plaintiff; and, in the case of writs of attachment, he is to attach so much of defendant's property as will satisfy the plaintiff's demand. In both of these cases he must take the personal property into his possession, and in the action of replevin deliver it to the plaintiff, and in the attachment case hold it subject to the order of the court. He must obey the command of the writ, whatever that may be. In the action of replevin, he has the description of the particular article

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according to the decisions, if it be a bill in chancery for that purpose service on the guardian is sufficient See Britton *v* Cowan, 5 Humphr 314, and cases since cited in Meigs Dig, § 1677 And in Speak & Pointer *v* Metcalf 2 Tenn Ch 214, it is said actual service on a lunatic will be dispensed with in chancery when it is shown to *be dangerous to the lunatic(?)*.

51. § 3536 *et seq*, M. & V
52. § 460, M. & V
53. §§ 1038, 4581, 4783, M & V.

which he is to take; he has nothing of this kind in the attachment, he is only commanded to attach so much of the estate of the defendant, etc The law gives him no other direction than that he must first attach personal property, and then land [54] He cannot, of course, take possession of the land

The sheriff is to make *due return* of all process to him legally issued and directed in his county.[55] A due return of a writ is an actual return of the writ itself, and an indorsement on it by the officer showing that he has done what it commanded, or a good reason why he has not done it. In the case of the summons, if he found the defendant, he would return the writ thus: "Executed Aug 25, 1885. W P Bandy, Sheriff" If he did not summon the defendant, then he must give a good reason for not doing so The common reason is, that he could not find him, thus: "The defendant not to be found in my county," signing as before. This return, standing alone, implies that the defendant resides in the county,[56] and that the sheriff has been at his place of abode in search of him [57]

Upon such a return as this the plaintiff may, as has been before stated, have an *alias* summons, or a judicial attachment, at his election [58] The *alias* summons is like the original, except that it begins thus: "You are commanded, *as you have heretofore been,* to summon," etc. If this also is returned as before, the plaintiff may have a *pluries* summons, and still if not found, an *alias pluries,* and so on until the defendant is found, or it is brought to the knowledge of the court, by the sheriff's return to that effect, that the defendant is not a citizen of the county. This would end the issuance of process for that particular

54. § 4239, M & V.
55. § 4868, subsec 2, M & V, 3 Yerg 327
56. 1 Swan, 298
57. § 421, M & V, Hayw 197, 10 Humphr 264.
58. § 4207, M & V.

defendant to that particular county. But if the court has acquired jurisdiction in the cause by service of process on other material defendants, or otherwise, the court, upon motion, would order counterpart process to any other county in the State where it might be supposed the missing defendant would be found.[59] But, on the other hand, if the missing defendant is the sole defendant in the cause, and the return of the sheriff is that he does not reside in the county, the court would not allow *alias* process, for it would be an abuse of the process of the court to allow the plaintiff to experiment with it, on the mere chances of the defendant at some time coming into the county.(*a*) If there are more defendants than one, and the writ is executed upon some and not upon others, the plaintiff cannot proceed with his suit against those that are found; he cannot file his declaration, nor take judgment by default, or any other step. He must wait until process is served on the other defendants, or he must dismiss his suit as to them, and then he may proceed. A plaintiff is allowed, either at this stage of the proceeding, or at any other time during the pendency of the suit, to dismiss it as to any one or more of the defendants, and proceed as to the others.[60]

If the process in the hands of the sheriff is the writ of replevin, in returning it he must, as in all other cases, indorse on it the facts. If he executed it in full, he would indorse it thus: "Executed by reading (or offering to read) the writ to the defendant, and taking the property described in the writ out of his possession, and delivering the same to the plaintiff. This Aug. 25, 1885. W. P. Bandy, Sheriff."

If he has done anything less than this, the fact should be stated, as that he summoned the defendant, but did not find the property, or that he took the property, or any part

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59 § 3526, M & V.
60 § 5018, M & V

(*a*) 1 Pickle, 165

of it, and delivered it to the plaintiff, but did not find the defendant.

If the process is a writ of attachment, the duty of the sheriff is to indorse on the back of the attachment, as a part of his return, every article of property attached by him, giving such description of it as may be necessary to identify it from other property of like kind. This is not always practicable to the degree of certainty. But it is the duty of the sheriff to act in good faith, and give the best description of the property that its kind will admit of, thus: "Levied on 1 black horse, supposed to be 6 years old, 1 red milch cow, one horn missing; 30 sheep, South-down breed; 30 stock hogs, Berkshire breed, 1 crib of corn, supposed to contain 50 barrels, 100 bushels of wheat," etc. Such description as this would be substantial as to some of the articles, and perhaps the best that could be given as to others, and would be sufficient in law. The sheriff is to take the personal property thus levied on into his possession, otherwise the levy is not complete,[61] and he becomes at once responsible for its safe-keeping.

If he finds no personal property, or not enough to satisfy the plaintiff's demand, he must state the fact in his return, and then proceed to levy on land, thus: "There being no personal property of the defendant to be found in my county, I therefore levy this attachment upon the following described tract of land, as the property of the defendant, to wit:" here must follow the description of the land. It is not required that this description should be by "*metes and bounds*," that is, by such calls as the surveyor's plat would contain in running around the land, fixing corners, distance, and direction. Such a description would, of course, be the best that could be given, and therefore sufficient in law; but it is also sufficient in Tennessee if its locality in a particular district is given, with names of the owners of lands sur-

61 Connell *v.* Scott, 5 Baxt 596, § 4239, M. & V.

rounding the tract levied on, or whose lands bound it on the north, east, south, and west The levy should also contain the estimated number of acres in the tract, and the levy should be dated.[62] If the sheriff finds personal property, but not sufficient, he must levy upon it, and then proceed thus: "The foregoing property being all the personal property belonging to the defendant, to be found in my county, and it not being sufficient to satisfy the plaintiff's demand, I therefore levy this attachment upon the following described tract of land (or real property), to wit:" and then proceed as above indicated.

If any of the personal property levied upon by the sheriff is so perishable, or its detention by the sheriff so expensive, as to render a sale necessary for the interest of all the parties before the return of the writ, the sheriff may sell it upon advertising as in execution sales, and return the facts If not sold by him before he returns the writ, it may be sold by order of the court. And if the nature of the property requires it, the court may appoint a receiver to take control of it, and manage it until final judgment[63] The law requires all original process to be returned, that is, brought back to the court, to which it is returnable, with a proper indorsement of what was done, on the first day of the term next after its issuance, if it is issued and served five days before such term. If issued and served within the five days, the process shall be returnable to the first day of the succeeding term.[64] This is a rule that applies only

62. The courts of Tennessee have gone to great lengths in upholding levies upon land in cases of imperfect description. The reader is cited to the following cases, where the descriptions were held sufficient 1 Humphr 80; 7 Humphr 181, 1 Swan, 10, 3 Yerg 177, 9 Lea, 307 Cases where held insufficient 2 Humphr 395, 3 Yerg 338, 3 Sneed, 221 Attachments from courts of law can be levied only on the legal title, and if the defendant has only an equitable title the levy is void 1 Heisk 30 Such is the construction placed on section 4241, M & V which would seem to allow attachments at law against legal *and* equitable titles.

63 § 4244 *et seq.*, M & V.

64. § 3535, M & V.

to courts of record, and not justices' courts — they having no terms. It is also a general rule, to which the writ of replevin seems to constitute an exception

It is provided in respect to this writ that it may be executed by seizing the goods or summoning the defendant, at any time before the first day of the term of court to which it is returnable.[65] From this it is inferred that the writ may be issued at any time, although it be less than five days before the term to which it is returnable. It was so decided upon a similar statute, passed in 1838.[66] The result of this exception is that a plaintiff may sue out his writ of replevin on Saturday before the meeting of the court on the following Monday, and if he succeeds in getting service on the defendant, and gets possession of the property on that day, his case would be fully in court, and he could file his declaration on the following Monday; and on failure of the defendant to put in his plea within the time prescribed by law, the plaintiff could proceed to judgment at that term. And if the plaintiff succeeded in getting service upon the defendant as above, but failed to get the property, he would still have his case in court, so that he could file his declaration in detinue, and, as before, proceed to judgment. And if he gets possession of the property, but without personal service, the case shall proceed as if the defendant had filed his plea (*a*)

When two replevin writs are successively returned without service, the plaintiff may then proceed to file his declaration upon the principle it is presumed that two *nihils* are equal to one service.[67] And so if he gets the property, and the sheriff's return shows that the defendant is a nonresident, the plaintiff may have publication for

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65. § 4118, M & V.

66 Farmers' Bank *v.* Johnson, 3 Humphr 26

(*a*) Such seems to be the meaning of sections 4120 and 4123, M & V, when construed together as parts of the same act.

67. State *v.* Dozier, 1 Tenn. (Overt.) 224.

the defendant, and after that may proceed to file his declaration.

Under the practice in Tennessee the proceedings in the County Court are almost without form. In instituting a proceeding in that court the complaining party usually files a petition and prays for process, and, upon the bond for cost being given, the clerk of that court issues the subpœna to answer, which is directed, as other process in courts of record, to the sheriff. The process, along with a copy of the petition, is delivered to the sheriff, and he serves it by reading the subpœna, and leaving with the defendant a copy of the petition. The command of the subpœna is that the sheriff summon the defendant to appear before said court at a particular time and place, and answer the petition.

Much of the business of the County Court is done on simple motion made in court, and again in cases of much importance parties are allowed to proceed upon motion, accompanied with private notice, which is not process. It is not a court proceeding according to the course of the common law. Its forms of practice and pleading are more in the nature of those enforced in the Court of Chancery.

In concluding this chapter it may be remarked that the leading process of other States may differ in detail from those described in this volume, but in substance they must be the same. The principle is that the defendant must have notice of the suit, either by personal service of process or by attachment of his property and publication, or by publication alone, and that the plaintiff is entitled to the process upon giving security for the costs, or upon such other conditions as the statutes may prescribe.

In many of the States the bond for costs, or taking the pauper oath is not a prerequisite to the institution of suit, but the defendant upon his appearance is entitled to a rule absolute upon the plaintiff to give the bond or take the oath.

CHAPTER IV.

PLEADINGS BY THE PLAINTIFF AND INCIDENTAL PROCEEDINGS.

§ 1. Pleading is absolutely essential to the orderly administration of justice. Its object and end is to develop the point of difference between the contending parties This point of difference is called the Issue, and is the thing to be tried. If it be not disclosed at the trial, the proceedings would be a mere groping in the dark An unknown point of difference could not be intelligently tried by the court; nor could the parties intelligently prepare for the trial. Hence the necessity for pleading.

In its earliest form it was nothing more than alternate oral statements made by the parties respectively, by the accusing party first, and then by the party accused, and this most natural and only true mode of reaching an issue continues to this day, except that in all courts of record a writing takes the place of the oral statement.

The first pleading, which is always by the accusing party (the plaintiff), is called a Declaration, which is defined to be a written statement of facts constituting the plaintiff's cause of action. In courts of law causes of action arise in two ways, first from the breach of contract and second from the commission of a tort, which is a wrong independent of contract. In respect to the first, the declaration would state as the cause of action, the making of the contract, and then the breach; in respect to the second it would state the existing right, and then the invasion of it.

When the plaintiff has filed his declaration, it then becomes the duty of the defendant to file his plea, which

is a written statement of the facts constituting his defense. This defense may take a variety of forms:

First. It may be a simple Motion to quash the writ because of some defect in it

Second It may be a Plea in Abatement by which the defendant seeks to abate the suit because of some irregularity or slip in the proceedings.

Third. It may be a Demurrer in which he admits the facts set forth in the declaration, but says they do not constitute a cause of action.

Fourth It may be a broad denial of the facts stated in the declaration, called the General Issue.

Fifth. It may be a denial of any one material fact called a Special Plea, or

Sixth It may admit all the facts stated in the declaration, but set up some new fact which shows the plaintiff ought not to recover, and then it is called a Plea of Confession and Avoidance.

The first and second forms are dilatory defenses founded on fact, the third is also a dilatory defense, but is founded on a question of law. A dilatory defense is one which delays the progress of the plaintiff without involving the real merits The fourth and fifth are called pleas in bar and tender issues on the facts constituting the plaintiff's cause of action The sixth is also a plea in bar, but it does not tender an issue, only pleas of denial do that This plea does not deny, on the contrary it admits as true all the facts set forth in the declaration, and then by an affirmative statement presents a new fact in avoidance of what would otherwise be the legal effect of the admission. Such a plea must therefore be replied to by the plaintiff, and this he does by a *Replication* But it is not intended to discuss now any other pleading than the declaration How the defendant shall make his answer to it, and the various other proceedings down to the issue, are reserved for succeeding chapters.

Pleadings should of course be conducted orderly. They should be free from confusion, not involved; brief, and without vain repetitions, and should present only such matters as are material and necessary to the statements of a good cause of action, or good ground of defense. Formerly many highly technical rules and peculiar phraseologies characterized pleadings greatly to the embarrassment of the ancient pleader, from which happily the profession of to-day is relieved, and now any pleading possessing the following requisites is sufficient:

First When it conveys a reasonable certainty of meaning.

Second. When by a fair and natural construction it shows a substantial cause of action or defense

If the pleading be defective in the first of the above particulars, the court on motion will direct a more specific statement; if in the latter, it is ground of demurrer. A thorough knowledge of pleading is of the utmost importance to the practitioner, and no opportunity should be lost in impressing this on the mind of the student of law. The attention of the reader is called to the note below, where the opinions of some of the sages of the law on the subject have been collected. Its careful reading is commended to the student [1]

1. Mr Stephens, in his work on Pleading, in speaking of the common-law system of pleading as it now exists, says

"This system of remote antiquity in its origin has been gradually molded into its present form by the wisdom of successive ages Its great and extensive importance in legal practice has long recommended it to the early and assiduous attention of every professional student Nor is this its only claim to notice, for when properly understood and appreciated it appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly to be entitled to the character of a fine juridical invention" And collected in the editor's (Mr. Heard's) preface to the last American edition of Mr Stephens' work, are found the following expressions Mr Justice Greer, of the Supreme Court of the United States, in speaking of the same English system of pleading, and of the efforts to destroy it in this country, says.

§ 2. The plaintiff is allowed the first three days of the appearance term within which to file his declaration; and if he does not file it in that time his suit may be dismissed on motion of the defendant[2]

"This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order But the attempt to abolish all species and establish a single genus is found to be beyond the power of legislative omnipotence The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice State legislatures may substitute by code the whims of sciolists and inventors for the wisdom of ages, but the success of these experiments is not such as to allure the court to follow their example" And again Judge Peck, of the Supreme Court of Tennessee, says (1 Yerg 392) "The science of good pleading should be cultivated by all who desire to excel in the profession The design of it is to simplify and make clear the very point to be settled It is the foundation on which every cause is to rest, and contains within itself the soundest logic From the black letter age to the present period the most admired of our judicial writers have recommended to the student a close attention to special pleading If I may be permitted the comparison, it is in our profession what lines and angles are to geometry, and either we must call ourselves back to this main point from which we are departing, or lose sight of law as a science And while we admonish the bar, *inferior jurisdictions* will find it important, in cases before them, to see that issues are so taken that the proceedings may be sensible, and thereby the means of doing justice the more certainly attained" And in speaking of the language of Judge Peck, another eminent jurist of the Supreme Court of Tennessee says (4 Heisk 204) "We commend this advice to the bar, especially its younger members, assuring them that the science of pleading, as perfected by the wisdom of centuries, can never be improved nor simplified by hasty legislation Its improvement must come of great minds whose lives have been devoted to it" And, again, in 2 Heisk 3, the same justice says "It will be better for the rights of parties, and the purity of the law, if we could return to the ancient way, treating pleading as a science, as the only true ground upon which the administration of the law can stand" And, finally, Lord Coke said (cited in 2 Tenn [Overt] 207) "Good pleading is honorable and excellent, and many a good cause is clearly lost for the want of good and orderly pleading"

2. § 5010, M & V The fact that the court does not convene for that term is no excuse, as he may file it with the clerk 5 Sneed, 642.

The *filing* of a declaration or of any other pleading simply consists in depositing it with the clerk, who is to indorse on it the day on which it was filed If it is not so indorsed it may be rejected by the court on motion, unless sufficient cause for the omission be shown The indorsement, however, is not a prerequisite to the *validity* of the pleading, and in the absence of the defendant's motion to reject it before verdict or judgment by default, it will be considered as waived [3] The court may enlarge the time for pleading, upon application of either party, or excuse the failure to plead within the time prescribed, upon good cause shown.[4]

FORMS OF DECLARATIONS ON CONTRACT.

§ 3 Let it now be supposed that James Smith has the following note on John Hart, to wit

$1,000 One year after date I promise to pay James Smith or order one thousand dollars This January 1, 1888 JOHN HART.

This is a negotiable promissory note If it had a seal or scroll annexed to the name of John Hart it would be called a bill single. In this note Smith is the payee and Hart the maker or drawer.

Now if the suit is brought by Smith (the *payee*) to recover this debt from Hart (the maker), the declaration would be in the following form:

Declaration No. 1.

James Smith
v
John Hart.

CIRCUIT COURT OF WILSON COUNTY.
September Term, 1888

The plaintiff sues the defendant for one thousand dollars due by promissory note, here to the court shown, made by him on the 1st day of January, 1887, and payable to the plaintiff on the 1st day of January, 1888, which with interest thereon remains unpaid [5]

C D, *Attorney for Plaintiff*

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3 2 Coldw. 486 4 M & V., § 5013

5. § 3049 (form 4), M & V The form here given is not a literal copy of that in the Code, nor does the section require it to be so

The caption or title contained in the words "Circuit Court, Wilson county, September Term, 1888," is perhaps of no real necessity as a part of the declaration, although the common law required that all pleadings should be entitled in this way, that is, by the use of words indicating in what court and at what term the pleadings were filed. The writ shows that there is in the Circuit Court an action between the parties. The indorsement of the clerk on it shows when it was filed. The entitling adds nothing to the certainty that it is the plaintiff's disclosure of the cause of action which the defendant is summoned to answer. It is usual to begin declarations, however, that way. The law of custom may make it necessary. It is sufficient to say it is added out of respect to common-law rules and to long-established usage. The brevity and simplicity of this pleading are admirable, and yet neither has been attained at the sacrifice of perspicuity.[6]

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6 In many of the States the pleading is by petition, answer, and demurrer or *exception*. (This latter term is borrowed from the civil law, and is used nearly in the same sense as *plea* at the common law. Its most common use in the States is as a demurrer. It is the allegation of the party that some pleading or proceeding is insufficient in law.) This mode of pleading is called CODE pleading, as distinguished from common law pleading. The student is liable to be misled in supposing a great difference to exist in the two systems, but the truth is, Code pleading in the several States is founded on common-law pleading. No new system of logic and reason in pleading has been reached, and as said in a former note it is beyond the omnipotence of legislatures to create one. The remarks of Mr. Stephens in his work on Pleading are of universal application throughout the civilized world. He says: "In the course of administering justice there are two successive objects, to ascertain the subjects for decision, and to decide. It is evident that toward the attainment of the first of these results, there is in a general point of view only *one* satisfactory mode of proceeding, and this is by making each of the parties state his own case, and collecting from the opposition of their statements the points of legal controversy. Thus far, therefore, the course of every system of judicature is the same. It is common to them all to require on behalf of each contending party before the decision of the case, a statement of his case." See Stephens' Pleadings, p. 1. The Code practice has departed to a greater or less extent from the *forms*

The names of the parties are stated in the margin, thus James Smith vs. or versus (against) John Hart, that is, Smith is the plaintiff and Hart the defendant Having placed the names in that way in the margin, they are referred to afterward as plaintiff and defendant, but in some cases it may become necessary to secure clearness of statement to repeat the names in the body of the declaration.

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known to the common law, and has newly named the pleadings What are called at the common law *declaration* and *plea* are called under Code practice *petition* and *answer* If the note on John Hart were sued upon in Missouri, where the Code practice is in force, a petition would be substituted for the declaration, and might be in the following form

Petition.

James Smith
v
John Hart
} CIRCUIT COURT, BENTON COUNTY.

Plaintiff states that defendant by his promissory note herewith filed, dated January 1, 1887, promised for value received to pay plaintiff the sum of one thousand dollars one year after the date thereof, which, and the interest thereon, are yet due plaintiff, and for which he asks judgment.

R P MCCLAIN,
Attorney for Plaintiff

And the answer which would be called at common law and in Tennessee *plea*, may be in the following form:

Answer.

James Smith
v
John Hart
} IN THE CIRCUIT COURT FOR BENTON COUNTY.

Defendant answers to the note mentioned in the plaintiff's petition, and says that at the time of its execution he was a minor under the age of twenty-one years

HENRY CRABB,
Attorney for Defendant.

These forms, if differently named, and called respectively declaration and plea, would be held good pleading in Tennessee They do not conform to the common law pleadings, nor are the forms in Tennessee literal in their compliance with those pleadings Still the above petition and answer convey a reasonable certainty of meaning, and by a fair and reasonable construction, show a sub-

The names of the parties stated in the margin must be the same as those stated in the summons or other leading process, unless new parties are introduced by amendment. If on the return of the writ or at any other time in the progress of the suit before trial the plaintiff discovers that new parties should be added, he may, by obtaining leave of the court, have them made parties by supplemental process or without process if the party is present and assents thereto.[7]

No civil suit shall be dismissed for want of necessary parties, but the court shall have power to strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court, upon such terms as to continuances

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stantial cause of action and defense, and, as stated in the text, this is sufficient in Tennessee. Taking the two forms above as fair illustrations of Code practice, it would appear that there is no great departure from common-law forms, and if the names had been preserved, it would not be deemed a material change in any sense. The real danger is that this change tends to the abandonment of all form in pleading, and where this is so, conciseness of statement is not encouraged but lost sight of, and prolixity and perplexing confusion may take the place of it. In Tennessee we have preserved much of the form, not all, however, of common-law pleading, and in every instance the common law names. This volume practically teaches common law pleading, and the forms which will be used as illustrations are in every essential taken from the Code of Tennessee. The student must remember that every system of pleading, both in Federal jurisdictions and in the several States, rests upon common law pleadings as its foundation, and if he obtains a knowledge of the latter he can readily adjust himself to any other. To use a classroom illustration of the author of this volume, if the tailor has learned the *principles* upon which garments are cut, he can readily adjust his knowledge to the changes in fashions. (Address of Judge Caruthers on assuming the duties of Professor of Law in Cumberland University, 1847.)

7. § 3495, M. & V. In Jones *v.* Clound, 4 Coldw. 241, it is said the order of the court granting leave to make an additional party is the *commencement* of the suit against that party. This statement is not supported by authority. The case to which the court refers is not on this point. The statement is contrary to the principle that suing out the process is the only mode of commencing an action prosecuted according to the course of common law. It is possible the court considered the *order* equivalent to *suing out process* for which there is no authority.

as the court, in its sound discretion, may see proper to impose If such amendments are applied for at the appearance term, they may be allowed without cost, but, if at any subsequent term, then upon such terms as the court may prescribe, so as to prevent delay.[8] Both the Christian name and surname of the plaintiff and defendant should appear without any abbreviations of either This would be necessary under the first rule of pleading, which requires that every pleading shall convey reasonable certainty of meaning. Thus, suppose you put the plaintiff's name J Smith, it would be uncertain whether you meant James, John, Jacob, Jonathan, or Jephtha Smith. This would at the common law be ground of *special* demurrer, which was a demurrer for insufficiency of *form*. But that is abolished, and no demurrer is allowed now except for insufficiency of *substance* If the defendant or the plaintiff wishes to object to the uncertainty because of the use of initials only, he must move the court to compel the adverse party to state the name more fully These rules, however, do not apply to cases founded on *written* contracts; in such cases the suit may be brought by or against any of the parties in the name and description used in the instrument.[9]

If a partnership sues, the name of the firm, and also the individual names of those composing it, must be stated, thus:

James Smith and Jno Den, partners under the style of
James Smith & Co.
v
John Hart.

If the suit was simply in the name of James Smith & Co, and the defendant neglects to make his motion for a more specific description of the plaintiff, and pleads

8. §§ 3580, 3581, M & V 9 § 3485, M. & V.

in bar, he will be considered as waiving the insufficiency of description [10]

If the plaintiff sues or the defendant is sued in a different name than his true name, as if it should be John instead of James Smith, or James instead of John Hart, this would be called a *misnomer*. This is not the uncertainty just spoken of, and which may be removed upon simple motion. It is a defect, it is true, but not one appearing on the face of the declaration, and must be disclosed by plea, called a plea in abatement, which must contain the true name of the party This plea in such a case rarely ever affects the litigation, for, upon the defendants filing it and disclosing the true name, the plaintiff would immediately obtain leave of the court to amend his writ and declaration by inserting the name disclosed by the plea [11]

No plea in abatement shall be received unless verified by oath or otherwise.[12]

HOW CAUSE OF ACTION STATED.

§ 4. The declaration should state the cause of action clearly, explicitly, and briefly [13]

But how clear and explicit must the statement be?

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10. This, it is true, is in contravention of the rule requiring joint obligees to sue jointly, but it proceeds upon the idea that the words "& Co" include every member of the firm If the suit was upon a note payable to James Smith & Co, the action might be maintainable upon the principle of section 3485, *supra*. If the defendant knows that the proper plaintiffs are not made parties, he should plead in abatement, and a failure to do so would be a waiver of the irregularity. Marshall *v* Hill, 8 Humphr 101

11. If the defendant is as well known by one name as another, or there be only a misspelling of the name, so that the name is *idem sonans*, or he has two Christian names, and omits one in his dealings with the plaintiff, the court will not interfere See Tidd Pr. 448

12. § 3611, M & V Such pleas are not favored, and courts will not allow them after a plea in bar, nor after appearance and judgment by default, nor after a general continuance See 9 Yerg 7; 7 Yerg 104, 9 Lea, 407, 1 Tenn (Overt) 248

13. § 3445, M & V.

No more than to convey a "reasonable certainty of meaning," and "by a fair and natural construction," to show a substantial cause of action No cavil, or straining, or criticism, is to be allowed as ground of exception, if the statement is intelligible enough, according to the ordinary meaning of the language used. Thus, to state that a person is "executor of A. B., deceased," is clear and explicit enough. It is "reasonably certain, by a fair and natural construction" of the language, that the pleader means one who is appointed by will to administer the estate of the deceased Therefore the language usually employed in pleading to express that character — "Executor of the last will and testament of A. B., deceased" — is unnecessary So, where the declaration states that goods were sold to the defendant by the plaintiff, at his request, the pronoun *his* refers, according to grammatical construction, to the plaintiff, the last antecedent But as that was not the meaning, as it would make nonsense, an English court set aside a special demurrer, on account of such inaccuracy, as frivolous [14]

Where a statement is capable of different meanings, that shall be taken which supports the declaration, and not that which will defeat it.[15]

So much only is to be stated as will with reasonable certainty, and by a fair and natural construction, show a good cause of action, if in the declaration; or a good defense, if in a plea. If it is unnecessarily prolix, or if frivolous or irrelevant facts are stated, the court may order them to be stricken out. If enough is stated to support the claim or defense, this excessive matter with which the pleading is incumbered will not vitiate it. If it is not stricken out, it is harmless surplusage. Even if it is contradictory and repugnant to what is well and

14. 3 Rob. Pr 514

15. 3 Rob Pr 514

sufficiently alleged, it will be rejected as mere nonsense [16] Only material facts are to be stated, not matters of law, nor arguments, nor inferences from facts.[17] There are certain facts that need not be stated, because the courts are presumed to know them without having them brought to their notice; such as the course of heavenly bodies, as when it was full moon, what day of the month a particular day of the week was, when the legislature met, who are the officers of the State, the boundaries of counties, and many other things.[18] Only those facts which constitute the cause of action are to be stated, not the evidence of them. The making of the note in the foregoing declaration is the fact that entitles the plaintiff to recover, not the circumstance that it is in the defendant's handwriting, or that he acknowledged it, or that he signed it in somebody's presence, the plaintiff's right to the property sued for, and not the fact that it was willed to him, or that he bought it, or that it was loaned to defendant, the fact that the defendant took it or detains it, and not any circumstances that go to prove these facts. It is only the facts which *constitute* the plaintiff's right of action that are to be stated, and not the facts that go to *prove* that right. If he alleges the essential facts of his own right and the defendant's wrong, and then states, in addition, the facts that go to prove them, this makes his pleading prolix, and it will be stricken out, on motion of the adverse party [19]

Only one cause of action should be stated in any one count of the declaration, and only one defense thereto in the plea If more be stated, the pleading is said to be double, and the fault is called duplicity. The remedy is to strike out, on motion of the adverse party [20] There are, however, some cases in which the declaration

16 3 Rob Pr 515, 516
17. § 3593, M & V
18. 1 Greenl Ev, § 6.
19 § 3594, M. & V.
20. § 3594, M & V.

may in one count set out several matters, each of which would sustain a separate action. Thus, it may state several notes for different amounts, made and payable at different times. So, in an action for goods sold, money loaned, work done, and many other things, they may be all united in one count (*a*) So, several breaches of a contract may be stated in the same count and judgment taken for such as may be proved.[21]

And a declaration may contain several *counts* or statements, each distinct from the other, and each containing a distinct, single cause of action, but where the causes of action are really distinct, the court may order separate trials of the issues that may be formed upon them [22] Thus will be avoided the confusion of trying several distinct matters at the same time. It may sometimes happen that the plaintiff will have two or more counts where he has really but one cause of action Not knowing in what shape the evidence may present the case, it may be policy to present it in his declaration in different shapes He is suing, for instance, on a parol contract: he may state the contract in one way in one count, and in another way in another count, and having elected so to state his case, then, if the testimony establishes a contract in either of the ways stated, he will recover So, if the action is for slander, it may be uncertain what the slanderous words were. The plaintiff will therefore state one set of words in one count, and another set in another, and so varying them in as many different counts as he chooses. Then, if the evidence establishes either set of words, he recovers.

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a Shan Code, § 4660, Form 8

21. 1 Chit 333, § 3608, M & V

22 § 3606, M & V, Wagoner *v.* White, 11 Heisk 745 Duplicity is a defect of form, not of substance, and cannot be reached by demurrer The objection must be taken by motion to strike out, or it may be done by the court on its own motion Wagoner *v* White, *supra*, Trabue *v.* Higdon, 4 Coldw. 624, § 3594, M & V

In this sort of case, where the different counts are employed merely for the purpose of stating the same cause of action in various ways, the court will not direct separate trials. In no case, however, will two or more counts be permitted to stand together, where they state different causes of action, which are inconsistent and repugnant to each other. Such a declaration would be demurrable (*a*)

If the suit is by or against an administrator or executor, the character in which he sues or is sued must be stated

Take the case of the note declared upon in Form No. 1; let it be supposed that James Smith and John Hart are dead, and that the suit is by the administrator or executor of the one against the administrator or executor of the other. The declaration would then be in the following form:

Declaration No. 2.

CIRCUIT COURT OF WILSON COUNTY

September Term, 1888

Hugh McDonnold, Admr (or Exr) of James Smith, deceased,

v

G R. Gwynn, Admr. (or Exr) of John Hart, deceased

The plaintiff sues the defendant on a note here to the court shown, made by John Hart, deceased, the intestate (or "the *testator*," if Gwynn is executor) of said defendant, on the 1st day of January, 1887, for one thousand dollars, payable on the 1st day of January, 1888, to James Smith, deceased, who was then alive The note, with interest thereon, remains unpaid The said James Smith having died intestate, letters of administration on his estate (or, if the plaintiff was executor, say "The said James Smith having died *testate*, letters testamentary"), here shown to the court, were granted to the plaintiff by the County Court of Wilson county, at its July term, 1888

R P. McCLAIN,
Attorney

The letters of administration or letters testamentary, mentioned in the foregoing declaration, are issued from the County Court and delivered in person to the one

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a Henderson *v.* Boyd, 1 Pickle, 21

chosen as administrator or executor, and constitute the evidence of his authority to act in that capacity The statement that John Hart, deceased, is the intestate or testator of the defendant, is the equivalent of a direct statement that the defendant, Gwynn, is the administrator or executor of John Hart, deceased This, and the exhibition of the plaintiff's letters, in the conclusion of the declaration, are necessary statements, for without them the declaration would fail to show a good cause of action in favor of the plaintiff or against the defendant

The proceedings to obtain these letters are regulated by statute in the several States. In Tennessee the County Court grants them upon application and proof of the death of the party. If there is a will the executor named therein is qualified upon proving the will by the attesting witnesses, or by such other means as are allowed by law. The letters may be in the following form:

STATE OF TENNESSEE — COUNTY COURT OF WILSON COUNTY.

July Term, 1888

To Hugh McDonnold:

You having been appointed administrator of the estate (or executor of the will) of James Smith, deceased, and having given bond and qualified as the law requires, this is to authorize you to take under your control the estate of said decedent, and as such administrator (or, executor) perform all the duties which are or may be required of you by law.

Given at the office of the clerk of the County Court for Wilson county, this 6th July, 1888 W M HARKREADER,
Clerk

Following this would be the certificate of the clerk that it was a true copy from his books.

§ 5. But, to return to the first form of declaration. It begins with the words: "The plaintiff sues the defendant for one thousand dollars." In every form of declaration these words or their equivalent will appear. It is the suing clause. According to the common-law form of pleading it was in this clause that the form of

action appeared. At common law the plaintiff had not only to state the facts which showed that he had a right to recover something of the defendant, but he had also to state in what form of action he sought that recovery. Thus, on the note for one thousand dollars due from Hart to Smith, the plaintiff might bring an action of debt or *assumpsit*. If he brought debt the declaration commenced as follows:

"James Smith, the plaintiff in this suit complains of John Hart, the defendant in this suit who is in court by summons of a plea that he render to the said James Smith the sum of one thousand dollars which he owes to and unjustly detains from him" [Then followed a minute description of the note, the circumstances of its execution and delivery, the legal obligation on the defendant to pay, and his failure to do so, and it then formally concluded as follows] "Wherefore, the said plaintiff saith that he is injured, and hath sustained damage to the amount of $——, and therefore he brings this suit"[23]

The words, "*of a plea that he render to the said James Smith one thousand dollars which he owes to,*" etc., distinguished this declaration from all others, and made it an *action of debt*. If he brought *assumpsit* the words would be "*of a plea of trespass on the case upon promises*" If the action was upon a contract under seal for the doing of anything but the payment of money, the action was "*covenant,*" and the complaint was "*of a plea of breach of covenants*" If the action was *detinue* it was distinguished by the words in the declaration "*of a plea that he render to the plaintiff certain goods and chattels*" If it was an action of *replevin* the words were "*of a plea wherefore he took the goods and chattels of the plaintiff and unjustly detained them,*" etc.

If the action was *trover* the words of the declaration would be "*of a plea of trespass on the case*" If the suit was for a direct injury, as for assault and battery, the action would be called *trespass,* and the words would be

23. 2 Chit Pl 20 354

' of a plea of trespass." If the injury to one's person or property was not direct and intentional, the action was *case,* and the words would be *" of a plea of trespass on the case,"* the same as in the action of trover.

If it was an action of *ejectment* the words would be, *" of a plea wherefore he, the said Rich'd Roe, with force and arms, entered into,"* etc., describing the premises entered upon [24] And so there was at the common law an appropriate and set form of words to be used both in the writ and in the commencement of the declaration, and though the facts set forth in the declaration might show a good cause of action, yet if the form of action disclosed by the set phraseology was not the proper form for the facts, it was fatal to the plaintiff's case. Happily the legislation of recent years in this country, and to a great extent in England also, has relieved the student from the consideration of such frivolous questions, and directs his mind more to questions of substance It is now no matter of great importance how the declaration begins or ends, so it shows a good cause of action.

§ 6. The next thing to be noticed in the declaration (Form No. 1) is the amount sued for. " One thousand dollars . . with interest thereon."

It is not necessary to set out the amount of the interest, or any particular amount as damages, in order to cover the interest, as it was according to the former law of pleading It is sufficient to show when the debt was due, and the amount of it, and to claim the interest as an amount to be ascertained by the law which regulates the quantity of interest.

If the note were payable in another State, where the interest was different, that fact, and the interest allowed by the law of that State, should be averred; otherwise it

24 See 2 Chit, where the forms are given under the heads of the several actions referred to in the text.

will be presumed payable where sued, and the interest laws of the forum would control.

If the amount claimed by the plaintiff to be due him appears with sufficient certainty, no matter how stated, or in what part of the declaration, it will be sufficient.

If any damage besides the interest is claimed — for instance, the costs of protest, where the action is against an indorser — it must be stated [25]

§ 7. There must be a good cause of action stated in every declaration.

The breach of contract which is the cause of action set forth in the declaration (Form No 1) is found in the words: "The plaintiff sues the defendant for one thousand dollars *due* by promissory note, . . which *remains unpaid*" This is a very simple and sufficient mode of alleging the breach of a contract to pay money.

When the contract is to do any other thing, the declaration should show in appropriate language that it has not been done, or, if the contract is *not* to do a certain thing, it must be stated that the thing *was done*. It is not sufficient to show a contract, there must be a breach of it to constitute a cause of action All contracts may be sued on in the same form of action;[26] which means, practically, that there is really *no form* of action on contracts. It is enough, in all cases, to set out what the contract was, and the breach of it, clearly, explicitly, and briefly.[27]

If the suit is upon an independent contract, that is, a contract which imposes some duty on the defendant which he has to perform without the doing of anything by the plaintiff, it is only necessary to show what the defendant agreed to do, the date of the agreement, the time within

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25 8 Yerg. 156, Burson *v* Cox, 6 Baxt. 362

26. § 3440, M & V Whenever the plaintiff may elect to sue in tort or on contract, counts in both forms may be joined § 4430, M & V.

27. § 3445, M & V.

which he was to do it, and then the breach — that he has not done it. The declaration in such a case would be in the following form:

Declaration No. 3.

A.
v. } CIRCUIT COURT, WILSON COUNTY, TENN.
B *January Term*, 1888.

The plaintiff sues the defendant for ten thousand dollars damages for this that the defendant received, at New Orleans, La., on the 1st day of October, 1888, as a common carrier one hundred hogsheads of sugar, to be delivered to the plaintiff at Lebanon, Tennessee The sugar has never been delivered Wherefore the plaintiff sues

C D,
Attorney for Plaintiff

The following is only another form for declaring on an independent contract, differing from No 3 in this, the defendant is supposed to have reduced his obligation to writing, putting it into the form of a bond with condition — the suit being upon the bond, for the breach of it.

Declaration No. 4.

A.
v. } CIRCUIT COURT, WILSON COUNTY, TENN.
B *January Term*, 1888

The plaintiff sues the defendant for five hundred dollars, for the breach of the condition of a bond, here to the court shown, made by the defendant on the 1st day of January, 1888, and payable to the plaintiff, in the sum of five hundred dollars, with condition that he would deliver to the plaintiff, at his mill in Lebanon, Wilson county, by the 1st day of July, 1888, five hundred bushels of good merchantable wheat. And the plaintiff says that defendant has never delivered said wheat, whereby the plaintiff has been damaged as above

C D,
Attorney for Plaintiff

Where the suit is on a dependent contract, that is, where the obligation on the defendant to do the thing contracted to be done depends on the doing of some other thing by the plaintiff, the declaration should, as in the last two forms, set out the contract in full, which in this case would show what each party was to do. Then the plaintiff

must aver the performance of his part of the contract (for without this the declaration would not show a good cause of action), and conclude with a statement of the particular in which the defendant has failed to perform his part Thus, after setting out the contract, the declaration would proceed as follows:

"Yet, although the plaintiff has fully performed his part of said contract, the defendant has failed to comply with its provisions on his part in the following particulars (1) He has not built said house, etc , (2) he has not," etc , briefly enumerating the breaches

It is not necessary, in such cases, if the contract is certain in its meaning, to set it out at length It would be consistent with brevity and explicitness to state it according to its legal effect But if it is of doubtful meaning, it is safest to insert a copy, and then state the breaches complained of.

There are cases of mutual promises in which it is not necessary for a plaintiff to aver performance on his part, but only a willingness, or readiness, or an offer to perform. Thus, if A. should bind himself to convey lands to B., in consideration of B 's promise to pay A so much money, the tender of the money under the contract, and the refusal of A to convey the land, would complete B.'s right of action against A And so if two persons should agree to marry, an offer or request to consummate the contract on the part of one, and a refusal on the part of the other, gives a right of action. The following form of declaration is sufficient in the case of the breach of an agreement to marry, and it illustrates the form of averment necessary in this class of cases.

Declaration No. 5.

A
v.
B } CIRCUIT COURT, WILSON COUNTY
May Term, 1888

The plaintiff sues the defendant for five thousand dollars, as damages for the breach of a contract, entered into by him and the

plaintiff on the 1st day of January, 1887, by which they mutually agreed to marry each other The plaintiff was then, and has ever since continued unmarried, and ready and willing to marry the defendant, and on the 1st day of April, 1887, requested him to marry her, but he then refused, and still refuses to do so

E E BEARD,
Attorney for Plaintiff.

If the defendant has married another woman, the declaration may be the same to the words, "ready and willing to marry the defendant," then proceed. "Until the 1st day of April, 1887, when the defendant married a certain Lucy Long." Here the declaration may end No request or allegation of refusal is necessary.

It is usual to insert counts on agreements to marry on a certain day, to marry in a reasonable time, and to marry when the plaintiff should be requested But the proof that would sustain either of these counts would sustain the above declaration to marry generally Thus, if the evidence was to marry on a particular day that would be evidence of an agreement to marry generally [28]

The allegation of a request or offer to marry may be proved, on the part of a female plaintiff, by any evidence of willingness on her part, and unwillingness on his, furnished through the interposition of friends [29] A direct offer of herself, as money or goods are tendered, is not required of a female

§ 8 According to the plainest principles of pleading the plaintiff, in stating the cause of action in the declaration, should show it to exist *in his favor*. If it should appear to be a cause of action in favor of some one else, or if it should not appear to be in favor of the plaintiff, the declaration would, of course, be held fatally defective on demurrer. So it is necessary, where a note or other instrument is declared on as the foundation of the suit, for the plaintiff to show in his declaration that the right to the instrument sued on is in him In no other way

28 1 M & P 239, 1 Stark 82 29. 2 Car & P 634

could a good cause of action at law in his favor be made to appear. In the declaration (Form No. 1), the note sued on is described as being "payable to the plaintiff" This is an essential statement, and, taken in connection with the further statement in the declaration that the note is due and unpaid, briefly and explicitly shows the right or cause of action in favor of the plaintiff.[30] This form of statement must be varied, however, to suit the facts of the particular case. The note may not on its face be payable to the plaintiff, and yet his right to the instrument, and his right to demand the money on it, may be complete. Let it be supposed that the note sued on in Declaration No 1 has been indorsed by the payee, James Smith, to Reuben Jones. This would be done by writing on the back of the note, "Pay to Reuben Jones James Smith" Or, "I assign the within note to Reuben Jones." Or it may be done simply by the payee, James Smith, writing his name across the back of the note, which would be called a *blank* indorsement, and Reuben Jones, or any one to whom he might deliver it, may write a full indorsement over the payee's name. Upon the note being indorsed in any of these forms, James Smith is called indorser, and Reuben Jones indorsee, assignee, or holder.

If Reuben Jones should bring suit on the note against the maker, the declaration would be in the following form

Declaration No. 6.

Reuben Jones
v
John Hart

CIRCUIT COURT, WILSON COUNTY
January Term, 1888

The plaintiff sues the defendant for one thousand dollars, due by promissory note, here to the court shown, made by him on the 1st

30 The corresponding form of declaration given in the Code of Tennessee entirely omits this important statement, that is, it fails to show to whom the note sued on is payable, and so (if the rules of pleading are to be regarded) it is defective in not showing the right and cause of action to be in the plaintiff It can be held good only because the statute by positive enactment has made it so. See § 3649, M. & V., Form No. 4.

day of January, 1887, due one year after date, payable to one *James Smith, and by him indorsed to the plaintiff*, the amount of which note, with interest, remains unpaid

E E BEARD,
Attorney for Plaintiff

This declaration differs only from Form No. 1 in the words italicized. This changed form of stating the plaintiff's right and cause of action is necessary, because the note sued on was not made payable to him; but it has become his of right, and payable to him, by reason of the indorsement, and he shows the necessary facts by stating the indorsement.[31]

The mere indorsement of a note does not, of itself, make the indorser liable to pay it. It has to be presented at its maturity, that is, on the day when it is legally due, to the maker, and if he fails to pay it, notice must be promptly given to the indorser, commonly by the next day or next mail at the farthest; and if the indorsee sues the indorser, these facts, or a legal excuse for their omission, must be stated in the declaration,[32] thus:

Declaration No. 7.

Reuben Jones
v.
James Smith

CIRCUIT COURT, WILSON COUNTY
January Term, 1887.

The plaintiff sues the defendant for this: That on the 1st day of January, 1886, one John Hart made his note, here shown to the court, for one thousand dollars, due one year after the date thereof,

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31. Form No 6, in the Code of Tennessee, corresponding with Form No 6, *supra*, does not in any way show the amount of the note sued on. That form is made good by express enactment, but certainly so important an omission in the description of the instrument should not be followed as a precedent § 3649, M & V, Form No 6

32 Without these material averments, the plaintiff shows in himself no cause of action The omission cannot be obviated upon the notion that it is a matter of form, or that it is cured by verdict. It is not the case of a defective statement of a valid title, or right of recovery, which may be aided by verdict, but it is the

payable to the defendant, and by him indorsed to the plaintiff. *The note was presented to said Hart for payment at its maturity, but was not paid, of which the defendant had due notice* The note, with *damages* and interest thereon, remains unpaid.

R P McCLAIN,
Attorney for Plaintiff.

The time when the note was presented for payment is no further stated than that it was at its maturity, nor is any day stated when notice was given the indorser of its presentment and nonpayment These facts are left to be shown by the evidence The commencement of this declaration differs from the preceding forms. "The plaintiff sues the defendant *for this*" — for this cause, on account of the following facts This is matter of form, and the pleader may always frame this introductory clause in such manner as his own taste may direct The change is made in this case because it could not be said with strict propriety that the indorser was sued either on the note or indorsement, but on them and the presentment and notice The word "damages," used in the form, is intended to cover the costs of protest These, *if claimed in the declaration,* are recoverable, the same as interest [33]

The maker and indorser of a note may be jointly or

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entire neglect to state any title whatever The plaintiff, to establish his right to a recovery, must aver demand and notice, or that both were waived in the indorsement which would be a legal excuse for the omission Harlan *v* Dew 3 Head, 505; Knott *v* Hicks, 2 Humphr 162 As to the conditional liability of an indorser, see Alton *v* Robinson, 2 Humphr 341 Cocke *v* Bank, 6 Humphr 52, Lane *v* Bank, 9 Heisk 435, Bynum *v* Apperson 9 Heisk 639. To whom the notice is to be given see Cocke *v* Bank, *supra*, Alton *v* Robinson *supra*, Pillow *v* Hardeman, 3 Humphr 538, Bank *v* White, 2 Humphr 112 By whom notice to be given see Marr *v* Johnson, 9 Yerg 1, Butler *v* Duvall, 4 Yerg 265 When notice to be given, see Cohen *v* Bank, 4 Baxt 423 1 Pars Cont (6th ed) 280 *et seq* What are legal excuses for not making demand and giving notice, see Apperson *v* Bank, 4 Coldw 459 Gilroy *v* Brinckley, 12 Heisk 392, Jackson Ins Co *v* Sturgis, 12 Heisk 344, Black *v* Fizer, 10 Heisk 50, Southworth *v* Thompson, 10 Heisk 15, Lane *v* Bank, *supra*, Polk *v* Spinks, 5 Coldw. 433

33. Rose *v* Perry, 8 Yerg 158

separately sued. If sued jointly the declaration would be as follows:

Declaration No. 8.

Reuben Jones
v
John Hart and James Smith.

CIRCUIT COURT, WILSON COUNTY.
January Term, 1887

The plaintiff sues the defendants on a note, here shown to the court, made by the defendant Hart on the 1st day of January, 1885, for one thousand dollars, payable one year after the date thereof to the defendant Smith, and by him indorsed to the plaintiff The note was, at its maturity, presented to the defendant Hart for payment, but was not paid, of which the defendant Smith had notice The note, with damages and interest thereon, remains unpaid

E E. BEARD,
Attorney for Plaintiff

§ 9. A bill of exchange is a written order from one person to another for the unconditional payment at a future day, to a third person, of a certain sum of money. The person who gives the order is called the drawer, the person upon whom drawn, drawee, and the person in whose favor drawn, the payee The drawee is not liable upon the bill until he accepts it, which he may do by writing the word "*accepted*" across the face of the bill, and attaching thereto his signature, then his liability to pay the bill at maturity is absolute and unconditional, and it requires no notice to fix it.[34] The acceptance, however, need not be in writing, if verbal, it is good.[35] If the payee of an accepted bill of exchange should wish to sue the acceptor, the declaration should be in the following form:

Declaration No. 9.

James Smith
v
Reuben Jones

CIRCUIT COURT, WILSON COUNTY.
May Term, 1887

The plaintiff sues the defendant on a bill of exchange, here to the court shown, drawn by John Hart at Baltimore, in the State of Maryland, on the 1st day of January, 1887, upon the defendant at Nashville, Tenn, for one thousand dollars, payable to the plain-

34 James *v* Bank, 2 Coldw 57 Blair *v* Bank, 11 Humphr 88
35 Montague *v* Myers, 11 Heisk 547, Mt Olivet Cem *v* Shubert, 3 Head, 120

tiff at sight (or, twenty days after sight, etc, as the bill may be). The bill was accepted by the defendant on the 1st day of February, 1887, yet the amount thereof, with interest, is unpaid

ROBERT HATTON,
Attorney for Plaintiff.

If the payee of the bill wishes to bring suit against the drawer for nonacceptance or nonpayment by the drawee, his declaration would be in the following form:

Declaration No. 10.

James Smith
v
John Hart.

CIRCUIT COURT, WILSON COUNTY
May Term, 1887

The plaintiff sues the defendant on a bill of exchange, here shown to the court, drawn by him on the 1st day of January, 1887, at Lebanon, Tenn, upon Reuben Jones, at Louisville, Ky, for ten thousand dollars, payable to the plaintiff two months after the date thereof The bill not being accepted when presented for that purpose was duly protested for nonacceptance, of which the defendant had due notice. The bill, with the damages and interest due thereon, remains unpaid

ROBERT HATTON,
Attorney for Plaintiff.

If the bill was accepted but not paid, then instead of the sentence, "The bill not being accepted," etc, state it thus: "The bill was accepted, but when presented for payment at maturity, was not paid, and was thereupon duly protested, of which the defendant had notice," and conclude as above.

The following differences between this declaration against the drawer and the preceding one against the acceptor will be observed:

1. This alleges a protest for nonacceptance or nonpayment. This is necessary to charge the drawer or indorser of a foreign bill, if not of a domestic one It is done by a notary public, who may also protest notes to make indorsers liable. His protest is sufficient evidence of due presentment of the bill and its nonacceptance or nonpayment. So his certificate in or on the protest that he gave notice to the drawer or indorser is evidence of the fact But to charge an acceptor there is no use for any protest.

He is the person bound to pay the bill, like the maker of a note, and the only design of the protest is to make the drawer and indorsers liable.

2. Notice to the drawer is alleged. Prompt notice has to be given to him of the nonacceptance or nonpayment by the drawee or acceptor No such thing, of course, is necessary as to the acceptor.

3. In this declaration it is alleged that damages, as well as interest, is due. When a bill is drawn or indorsed in this State upon any person in another, and it is returned unpaid, the drawer and indorser are not only to pay interest and charges, but certain damages fixed by law. But the acceptor, when sued by the holder of the bill, has to pay nothing but interest. Therefore, no damages are alleged in the declaration.

The indorsement of bills is stated in the same way as the indorsement of notes, and the form of stating the indorsement in Nos. 7 and 8 has only to be added in No. 9 to make a complete declaration by the indorsee of a bill against the acceptor, and in No 10 to make it complete by an indorsee against the indorser of a bill

§ 10. Notes made payable to a person named, *or bearer*, pass by delivery, and, without indorsement, any person having possession of such a note is deemed in law the legal owner and may sue thereon The following would be a good declaration in such a case by the holder or bearer.

Declaration No. 11.

Reuben Jones
v.
John Hart

CIRCUIT COURT WILSON COUNTY
January Term, 1887

The plaintiff sues the defendant on a note for one thousand dollars, here shown to the court, made by him on the 1st day of January, 1885, payable to John Den, or bearer, on the 1st day of January, 1886, and the plaintiff afterward became and still is the *lawful bearer* thereof The note, with interest thereon, remains unpaid [36]

C D,
Attorney for Plaintiff.

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36. 2 Chit Pl 130

In declaring upon a note, it is usual to describe it as being made on a certain day. A note might be dated on a different day from that on which it was made. Then it should be stated that it was made on a certain day and dated on a certain other day, if its true date is a matter of any importance. An instrument may have an impossible date, as the 30th of February. Then it is important to state when it was made So, if it has no date

The time when the note is payable should be stated This is important in order that it may appear that the debt is due. If it is due when the declaration is filed, but was not when the writ was issued, the defendant may plead that fact in abatement. If he does not, but pleads in bar, he can never take any advantage of the prematurity of the suit[37] If it should appear from the declaration that the debt is not yet due, it would be ground of demurrer, for there could be no cause of action until the defendant has wronged the plaintiff by failing to comply with his contract, and there is no such failure until the debt is due and unpaid In this case, if the defendant does not demur, it appears that he may take advantage of it on the trial, or by motion in arrest of judgment, or by writ of error[38]

Notes are often payable on a particular day, instead of a certain time after date In this case the declaration would describe it accordingly, as "Payable to the plaintiff on the 10th day of July, 1886" If they are payable on demand it should be so stated If there is no time

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37 Reed *v.* Brewer, Peck, 275, Carter *v* Turner 2 Head, 52 *Contra*, Bell *v.* Bullion, 2 Yerg 479 See also Simmons *v* Harris, 7 Baxt 326, where the court inclines to the view that the defendant might rely upon the prematurity of suit upon a defense to the merits, and without plea in abatement The authorities on this subject are in conflict, but it is believed the text states the true rule The case in 2 Head, *supra*, is directly in point, and fully sustains the text

38. Shepherd *v* Kindle, 3 Humphr 81, Carter *v* Turner, 2 Head, 52

of payment specified in the note, then it is payable as soon as given, and draws interest from date [30]

Negotiable instruments (which are notes for money or bills of exchange), except bills payable at sight and notes payable on demand, cannot be sued on until the third day of grace, that is, three days after they are due on the face of them.[40] Thus, the note in Declaration No 1 is due on its face on the 1st day of January, 1886, but it is not due in law until the 4th of January. At any time on that day, after demand of payment, the maker and indorsers may be sued.[41] Other contracts may be sued on the day after the duty stipulated is to be performed, and not before.

When a note is payable on demand, no other demand is necessary than the bringing of the action [42]

§ 11. In all actions upon written instruments, which constitute the foundation of the suit, profert of them must be made in the declaration, and when the defendant rests his defense upon a written instrument the rule is the same; profert of it must be made in his plea [43] It is not all writings which are necessary in the prosecution or defense of the suit that are to be made profert of, but only such as are the *foundation* of the action or defense. In the action of ejectment the plaintiff may have to introduce a deed as *evidence* of his title; but this is not the foundation of his suit So a defendant may introduce in *evidence* a receipt showing that he has paid the debt for which he is sued; but the *fact* of payment is the foundation of his defense, and not the evidence of it. If, how-

39 Collier *v* Gray, 1 Tenn (Overt) 110, 1 Pars Cont (6th ed) 269

40 § 2722, M & V, 1 Pars Cont (6th ed) 276 The rule allowing days of grace is abolished in Tennessee See Act 1899, § 85

41. Coleman *v* Ewing, 4 Humphr 242

42. § 2704, M & V, Moore *v.* Fitzpatrick, 7 Baxt 350, Bryant *v* Puckett, 3 Hay, 252.

43 § 3599, M & V.

ever, it be a release of the debt, or a defeasance to the contract, or any sort of written acquittance, it is the foundation of the defense, and should be pleaded with profert.[44] Profert means, literally, to carry or bring forward. In pleading it means that the thing made profert of is here in court or in the possession of the pleader, ready to be produced and shown to the adverse party if desired.

Profert is properly pleaded by the use of the words, "here to the court shown," and these are the words used in the foregoing forms of declarations. The want of profert, where it should be pleaded, is ground of demurrer, but in the absence of demurrer it is a defect which is cured by verdict, and is waived by a plea to the merits.[45]

If the instrument sued upon is lost or destroyed, or in the possession of the adverse party, so that profert cannot be made of it, that fact should be stated as an excuse for not doing so. Thus, instead of saying, "here to the court shown," say, "which, being lost, cannot be here shown to the court;" or, "which, having been destroyed by accident, cannot be here shown to the court;" or, "which, being in possession of the defendant (or plaintiff), cannot be here shown to the court." The true excuse should be stated, and, whatever it might be, if it showed that the party could not produce the paper, it was all that was necessary at the common law.[46] Upon that alone the defendant had to plead to the declaration and deny the execution of the instrument by the plea of *non est factum*, otherwise it was admitted, or so much of it at least as was set forth in the declaration.[47]

The excuse for not making profert, if not traversed, which might be done, was also admitted.

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44. 1 Chit. Pl. 365.
45. Lowery v. Medlin, 6 Humphr. 461.
46. 2 Chit. Pl. 439, 1 Chit. Pl. 365.
47. 2 Greenl. Ev., § 234.

Under the law of Tennessee the excuse for not making profert is required to be set out in an affidavit, to be filed with the declaration, stating the loss of the instrument or the fraudulent possession of it by the defendant, its contents, and that it is still the property of the plaintiff The affidavit becomes a part of the declaration, which is demurrable without it, or with it, if it is insufficient. It is to be verified before the court, or clerk of the court, where the suit is instituted or pending, and is to be taken as a substitute for profert and oyer of the instrument.[48] If the instrument is wrongfully in the possession of the defendant, notice must be first given him to produce it, and if he fails to do so, that fact should be stated in the affidavit.[49]

§ 12. Before passing from the subject of declarations on contracts, it may be of benefit to the student to give the form of a declaration on an official bond Such bonds being given for the security of the public and of individuals, any person may sue who may be injured by the breach of them, but, as they are made payable to the State, the suit must be in the name of the State for the use of the party aggrieved The following form of declaration will be good against an administrator and his sureties by a creditor where the breach complained of is a *devastavit*, or waste of the estate

Declaration No. 12.

State of Tennessee for the use of A B, v. C D E F, and G H } CIRCUIT COURT, WILSON COUNTY *May Term*, 1888

The plaintiff sues the defendants for one thousand dollars as damages for this The defendant C D was, on the 1st day of January, 1887, appointed by the County Court of Wilson county, Tennessee, administrator upon the estate of Robert Mayfield, de-

48 Carter *v* Vaulx, 2 Swan, 640, Baker *v* Gregsby, 7 Heisk. 629, § 4659 M & V

49. § 4660, M & V

ceased, and said defendant gave bond in said court on the day of his appointment, with defendants E F and G H as his sureties, conditioned to be void if defendant C D should perform the duties required of him by law as such administrator A certified copy of said bond, the original of which is of record in said County Court, is here shown to the court The plaintiff avers that defendant C D has broken the condition of said bond in this On the 1st day of October, 1887, A B recovered a judgment against defendant C D, in the Circuit Court of Wilson County, for the sum of five hundred dollars, and costs, to be levied of the estate of said Robert Mayfield, deceased, in said C D.'s hands to be administered, upon which an execution was issued November 10, 1887, and was returned by the sheriff of said county, no property of the said estate to be found, and the plaintiff avers that the defendant C D has wasted said estate which came to his hands to be administered as afore said, so that said judgment remains unsatisfied

ROBERT HATTON,
Attorney for Plaintiff

The substance of this declaration is the giving of the bond in the County Court, containing the covenant in the condition to perform the duties of administrator, the breach of that covenant by wasting the estate so that no property could be found to satisfy the judgment obtained by A. B. So the distributees might sue on the bond for a breach in failing to file an inventory; for not settling up the estate; for not paying over what was found due them on settlement; for wasting the estate; or for any other breach of the condition of the bond by which they are injured

FORMS OF DECLARATIONS IN TORT.

§ 13. It has been already stated that all causes of action arise either from breaches of contracts or from torts, which are wrongs independent of contract to person, property, or character. For all injuries to the person or character, or to property in possession of the plaintiff, he sues for damages, or in other words, for pecuniary compensation If the wrong consists in taking or withholding from the plaintiff the possession of his property, he has his choice, either to sue for damages alone, or to regain the possession of his property, and also the dam-

ages for the detention thereof. If the suit is for damages alone, the value of the property is usually the measure of compensation, but if there are aggravating circumstances in the taking or withholding, the damages may thereby be enhanced, and the plaintiff may not only recover full compensation for the injury suffered, but an additional sum as exemplary damages by way of punishment to the defendant. Such damages are sometimes called *smart* money.

Where the plaintiff seeks to recover the specific chattel withheld from him, he may elect in bringing his suit to have the property sued for delivered to him at the beginning of the action, or let it remain in the possession of the defendant until the suit is ended, and his right to the property ascertained by judgment of the court If he pursues the former course, his action is replevin, if the latter, his action is detinue

The following is the form of a declaration in replevin:

Declaration No. 13.

J N McKenzie
v
Hugh McDonnold
} Circuit Court Wilson County
September Term, 1888

The plaintiff sues the defendant for one black horse sixteen hands high, and six years old, and fifty dollars as damages for the detention thereof Said horse is the property of the plaintiff, and he is entitled to the possession thereof The defendant wrongfully detained said horse from the plaintiff from January 1, 1888, to September 1, 1888

R P McClain,
Attorney for Plaintiff

If the plaintiff should sue in detinue, the declaration would be the same as in replevin down to the concluding sentence in the above form, and then it would proceed as follows: "The defendant wrongfully detained said horse from January 1, 1888, and *still detains him*"

This slight variation in the two forms arises out of the fact that in replevin, as above intimated, the plaintiff gets

the property at the beginning of the suit, which terminates the detention, while in detinue he obtains the possession of the property at the end of the suit.

The declarations in replevin and detinue present the following points, all of which are essential:

1. *What the plaintiff sues for,* that is, *a horse, and damages* for the detention. The damages should be laid high enough to cover everything the plaintiff is likely to recover. You can recover less damages than are laid, but you cannot recover more

The standard or measure of damages in these cases is the value of the use of the property sued for during the time it was detained. Aggravating circumstances, however, such as the abuse of the property during the detention, might present a case for the application of a different rule and for the giving of higher damages.[50]

2 *The description of the property.* This need not be accurate, but substantial, for after all, however accurate the description may be, the identity of the thing sued for must be proved by witnesses acquainted with it.

3. *That the thing sued for is the property of the plaintiff* He is not bound to show how it became his property, nor whether it be a general or special property. No matter what may be the ground of his claim, the foregoing declaration is sufficient, he is to state that the property or right of possession is his, and on the trial before the jury he must show the facts that prove it to be his, either in right of property or possession.

4. *The detention of the property and the length of time thereof* Declarations must always show a right in the plaintiff and also a wrong in the defendant. The un-

50 2 Pars Cont (Replevin), p 219 Perhaps damages for deterioration in value or abuse of the property sued for could not be recovered under the form of declaration given in the text But are not such damages recoverable in an independent suit brought for that purpose? It is so decided in Tennessee, where the suit was by the defendant. Colby *v* Yates, 12 Heisk 267.

lawful detention is therefore a necessary averment to show the wrongful act of the defendant, and the time of detention is necessary in nearly all cases in determining the damages to be assessed in favor of the plaintiff [51]

It has been seen that where the wrong consists of unlawfully withholding the possession of personal property, the action of replevin or detinue may be brought by the injured party In such a case the injured party may elect to pursue either of those forms, or he may sue in trover, in which action the plaintiff does not seek to recover the property at all, but only damages for the conversion of it. The value of the property withheld by the defendant *at the time of conversion*[52] is the measure of damages in the action.

If the defendant who has hired or borrowed from the plaintiff a horse, or has otherwise lawfully obtained possession of it, uses it for other purposes than those specified at the time of obtaining possession, he is said to have converted the property, that is, made it his own,

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51. At the common law, replevin lies only where the taking amounts to trespass In some States this may be the law, but in Tennessee and many other States the rule is changed In Tennessee the action will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant No matter how rightfully the defendant may in the first instance have obtained the possession, whether by contract or otherwise, whenever such right ceases, the plaintiff may sue in replevin See Shaddon *v* Knott, 2 Swan, 359

The general rule that the defendant cannot proceed by replevin for the goods taken under execution by the sheriff only applies when the officer is proceeding rightfully, but if he levy on exempt property the action lies And so it lies in the joint name of the husband and wife, if the wife's property has been levied on for the husband's debt 4 Lea, 499

If the use of a chattel is vested by contract in one, and the holder of the legal title regains the possession in violation of the contract, replevin will lie against the owner 5 Sneed, 416

52. Fort *v* Sanders, 5 Heisk 488, 3 Pars Cont. (6th ed) bot. p 211 Interest is also allowed on the value from date of conversion. 3 Pars. Cont (6th ed) 213

so that the plaintiff may sue in trover *for its value* as damages for the wrongful conversion [53] So it is equally a conversion where the defendant has wrongfully obtained the possession of the property, and has d yed it or sold it, or failed to return it.

The following form is given as a sufficient declaration in an action of trover:

Declaration No. 14.

J N McKenzie
v
Hugh McDonnold

CIRCUIT COURT, WILSON COUNTY
September Term, 1886

The plaintiff sues the defendant for three hundred dollars for the conversion by him on the 1st day of August, 1886, of a black horse, the property of the plaintiff

E E BEARD,
Attorney for Plaintiff

This form of declaration will be sufficient in either case, whether the defendant obtained the possession of the horse lawfully or unlawfully. It may be doubtful whether an act amounts to a conversion, or whether the wrong consists in the omission of due care by a bailee, or is merely an injury to property in the plaintiff's possession The doubt in such case may be provided for by framing the declaration with three counts, one for conversion, another for negligence, and a third for injury to the property while in the possession of the plaintiff. It may be useful to the student to have before him the form of a declaration, with two or more counts.

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53 A conversion in the sense of the law of trover, is the appropriation of the thing to the parties' own use and benefit, or the exercise of dominion over it, in defiance of the plaintiff's right It may be said there can be no conversion that will support the action of trover, unless the defendant knows of the adverse right and claim of the true owner 2 Greenl Ev, §§ 642–644, Roach *v.* Hawkins, 9 Heisk. 708. The true owner must make known his claim and make demand of the property in every case where it is necessary as information to the defendant.

The following is submitted, the foregoing declaration (No. 14) being used as the first count:

Declaration No. 15.

J N McKenzie
v
Hugh McDonnold

CIRCUIT COURT, WILSON COUNTY, TENN
September Term, 1886

The plaintiff sues the defendant for three hundred dollars for the conversion by him on the 1st day of August 1886, of a black horse, the property of the plaintiff

SECOND COUNT And also for three hundred dollars damages for this The defendant for the consideration of thirty dollars paid to him by the plaintiff agreed to take, and safely keep, and care for one black horse, the property of the plaintiff for the period of three months, and said horse was delivered to said defendant under said contract The plaintiff avers that the defendant, by reason of his gross negligence allowed said horse to be chased by dogs, which caused him to fall into a ditch, whereby he was crippled and rendered valueless

THIRD COUNT And also for three hundred dollars damages for that, the defendant, while in the employ of the plaintiff as a servant charged with the duty of caring for a certain black horse, the property of the plaintiff, did wrongfully chase said horse with dogs, which caused him to fall into a ditch whereby he was crippled and rendered valueless

E E BEARD,
Attorney for Plaintiff

The first count in this declaration assumes that the property was in the possession of the defendant at the time of conversion; but the facts in the case may not sustain the charge of conversion, and so the second count may be necessary. This count proceeds on the idea that the property was in the possession of the defendant as bailee, and it seeks the recovery of damages for his negligence as such; but in this case also the facts to be relied on at the trial may not clearly establish the relation of bailor and bailee, and hence leave in doubt the question of who had the possession of the property at the time of the wrong complained of This would make it necessary to add the third count. This count treats the wrongdoer (the defendant) as the servant of the plaintiff at the date of the wrongful act, and hence assumes that the property

was in the possession of the plaintiff at the time of the injury The custody of the horse being in the servant, the possession in law is in the master.

If the suit is to recover damages for injuries immediately and directly done to the plaintiff's property while in his possession, the declaration may be in the following form.

Declaration No. 16. Trespass.

J M
v. } CIRCUIT COURT, WILSON COUNTY, TENN
H M. } *September Term*, 1886

The plaintiff sues the defendant for three hundred dollars as damages for wrongfully cutting off the ears of one black horse, the property of the plaintiff, whereby the value of said horse was greatly impaired.

R. P McCLAIN,
Attorney for Plaintiff

If the injury to the plaintiff's property was not immediate but consequential, as for keeping vicious animals, having notice of their propensity, the declaration may be in the following form:

Declaration No. 17. Trespass on the Case.

J M
v. } CIRCUIT COURT, WILSON COUNTY
H M } *September Term*, 1886

The plaintiff sues the defendant for three hundred dollars as damages for the killing of a Jersey cow, the property of the plaintiff, by the defendant's dog The said defendant well knowing the vicious propensity of said dog, negligently permitted it to go at large

R P McCLAIN,
Attorney for Plaintiff

These two declarations Nos 16 and 17 present the distinction made at common law between the two actions of trespass and trespass on the case. The first, No. 16, is the form of a declaration to be used in all cases of direct and violent injury; the latter, No. 17, is used in all cases where the injury is not immediate, but consequential, as resulting from some unlawful or negligent act If one's dog whose vicious propensity is known to the owner is

negligently or unlawfully allowed to go at large, and of his own motion should bite another, trespass on the case lay at the common law; but if the owner should by words or acts encourage the attack of the dog, and injury resulted, trespass was the proper action. It is not necessary that the act should be willful to sustain trespass. It is sufficient if a wrong act is done, and the consequence is such as might naturally and reasonably follow from it, as if one should strike a horse upon which a person is riding, and the rider be thrown to the ground and injured — the action is trespass — not because it was a necessary consequence that the rider should be thrown, or *that it was designed* that he should be, but because it was an event which might have reasonably followed, as the immediate consequence of the act done.[54] This distinction could not be ignored at the common law, and, as we have seen, was of the utmost consequence to the pleader, for if he happened to file his declaration in case, and the facts set out in his declaration showed the action to be trespass, it was fatal. Other consequences flowed from this distinction of vital importance to the defendant where in pleading he rested his case upon the general issue, which will be noticed hereafter.

In Tennessee, and by substantially the same statutory provisions in many of the States, all wrongs and injuries done the property or person of another, where money is demanded as damages, may be redressed in *an action on the facts of the case*. This rule has made unnecessary the technical forms of the common-law declaration in such cases, and this is all it has done. It has destroyed the ancient forms, but it has not affected the distinctions which the law makes in the wrongs, nor indeed has it

54 See 1 Chit 126 *et seq*, for a very lucid statement of the common law distinctions between trespass and case See also Henley *v* Neal, 2 Humphr 550, Johnson *v*. Perry, 2 Humphr 569, Luttrell *v* Hagen, 3 Sneed, 20

changed the *names* by which particular wrongs were known at the common law.

If "the facts of the case," set out in the declaration, present a good cause of action, it would at the same time necessarily show the action to be trespass or case, or whatever else it would have been at common law, and whatever it happened to be, the common law, inherent in the particular action, would attach, to control subsequent pleadings, the rules of evidence and the rights of parties The fact that in Tennessee and in many of the States all contracts may be sued on in one form of action, and all wrongs to person and property, where the plaintiff seeks to obtain money as damages, may be redressed by an action on the facts of the case, does not change the law of contracts or torts, nor affect the distinctions existing between them.

§ 14. If the wrong consists of withholding from the plaintiff the possession of his land, he may bring one of two actions, to wit, ejectment or forcible entry and detainer If the plaintiff is to proceed in the suit upon the idea of superiority of his title, he brings ejectment. But if the gravamen of the action is that the plaintiff had peaceable possession of the land, and the defendant forcibly entered and expelled him, or, having entered without violence, kept the plaintiff out forcibly, or where a tenant, after his time is out, refuses to surrender to his landlord, in these cases the action is forcible entry and detainer, in which action the title to the property is not involved, but the right of possession only.[55] It may be brought in the Circuit Court, but it is usually brought before justices of the peace. The whole proceeding is set out in the Code of Tennessee,[56] and, doubtless, similar provisions are to be found in the codes of other States

55. 9 Yerg 95, 9 Yerg 320, 1 Swan, 173, 1 Head, 428, Mart & Y 258, 6 Heisk 124 As to what constitutes forcible entry and detainer, see 1 Sneed, 246, 9 Yerg 317, 1 Head, 136

56. See § 4079 *et seq*, M & V.

The following is a good form of declaration in ejectment.

Declaration No. 18.

A. B
v
C D.

CIRCUIT COURT, WILSON COUNTY.
May Term, 1887

The plaintiff sues the defendant to recover the following tract of land lying in Wilson county, district No 1, and bounded as follows Beginning at an elm, running thence north 320 poles, thence east 320 poles, thence south 320 poles, thence west 320 poles to the beginning, and containing 640 acres, more or less, of which the plaintiff was possessed, claiming in fee (or for life or years) on the 1st day of January, 1887, and after said possession accrued, the defendant, on the 1st day of February, 1887 entered thereupon and unlawfully withholds and detains the same, together with one thousand dollars due for the detention thereof

ROBERT HATTON,
Attorney for Plaintiff

The declaration must describe the land sued for, and in the foregoing form it is described by metes and bounds This description, however, need not necessarily be by metes and bounds. Where it can be so described it is better and safer to do so But if it be described with substantial accuracy, so that the sheriff, upon a general verdict for the plaintiff, could put him in possession, it would be sufficient.

The following description has been held sufficiently certain "Lying in the Tenth Civil District of Campbell County, Tennessee, bounded on the north by the lands of A, on the east by the lands of B, on the west by the lands of C, and on the south by the meanders of Clinch river, containing," etc.[57]

The allegation in the declaration that the plaintiff was possessed of the land sued for is a necessary statement, whether the plaintiff was ever actually in possession or not.

The time of the plaintiff's alleged possession must be

57 Smith *v* Cox, 6 Heisk 463, § 3059, M & V.

laid subsequent to the accruing of his title.[58] The law considers that he who has title, has the possession.

The plaintiff may have inherited the land, or bought it at execution sale, or acquired it by will, at a time when it was, and it may have ever since remained, in the actual adverse possession of another Still he must declare that he was possessed of it, and this statement is sustained if he shows on the trial a right to the possession at the commencement of the suit[59]

But, if one buys land from another at private sale, which is adversely held by a third party, the purchaser cannot maintain ejectment. A deed to lands acquired thus is void for champerty; the title is held not to have passed out of the vendor, and the void deed cannot be set up to the prejudice of his rights[60] The plaintiff must also state what estate or interest he claims in the land, which may be an estate in fee, or for life, or for years[61] He must also allege that the defendant entered upon the land, and withholds the same.[62] It is not, however, necessary that the defendant should be in actual possession to sustain the suit against him. If he is exercising acts of ownership over it, or even setting up claim to an interest in it, he may be sued.

The plaintiff is at liberty to treat the defendant's naked claim to the land, as entering upon it, and withholding it[63]

The declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others, but no person's name can be used as plaintiff without his consent, unless he be

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58 Ward *v* Daniel 10 Humphr 606
59 § 3966, M & V
60. Wilson *v* Nance, 10 Humphr 100, 4 Kent, 448, 5 Johns 489; 7 Heisk 729
61 § 3959, M & V 62 § 3959, M & V
63. § 3955, M & V, Smith *v* Lee, 1 Coldw 550, Longford *v.* Love, 3 Sneed, 308, Padgett *v.* Baker, 1 Tenn. Ch. 225.

tenant in common with the party commencing the suit.[64] Any one of several parties entitled may sue for and recover his individual share. Originally (and it is still so in some of the States), the practice was, when the plaintiff recovered the land, to give him at the same time damages, to the extent of the profits of the same, during the term for which it was tortiously held by the defendant. But by the practice in Tennessee, the damages are nominal in ejectment, and a distinct action for mesne profits must be brought.[65]

The action for mesne profits is brought *after* the right of the land is legally established by the judgment in ejectment. It is subsidiary to or consequent upon that action. The one establishes the right to the land, and regains the possession, the other ascertains the damages for the detention of it. In the action for mesne profits, the plaintiff is usually entitled to recover as much as the rental value of the land during the defendant's occupation. The defendant may have also committed waste on the premises for which the plaintiff should be compensated, and he may have been put to the expense of attorney's fees and other costs in regaining the possession; all these he may recover in this action. It is called an action for *mesne* profits, because the main object is to recover the profits that have been, or that might have been made out of the land by the defendant, *between* the time of his taking possession and his eviction by the plaintiff. The following form of declaration in such action is sufficient:

Declaration No. 19.

A B, C D } CIRCUIT COURT, WILSON COUNTY, TENN. *January Term*, 1886

The plaintiff sues the defendant for one thousand dollars as damages accruing from the following facts. 1. On the 1st day of

64 § 3690, M & V.
65 § 3990, M & V; Avant *v* Ford, 3 Head, 460.

January, 1885, the defendant expelled the plaintiff from the possession of his land, situate in Wilson county, district No 5, and bounded as follows Beginning at a beech, running thence north 160 poles, thence east 100 poles, thence south 160 poles, thence west 100 poles to the beginning 2 The defendant withheld the possession from the plaintiff, from the time of his expulsion to the 1st of January, 1886, and during that time received all the profits of the land, and committed great waste thereon by the destruction of timber, fences, houses, etc 3. The plaintiff was put to great expense in recovering possession of the land

ROBERT HATTON,
Attorney for Plaintiff.

Here is some variation from the ordinary form of stating the facts of the case. In an action founded on tort, the plaintiff is to state what he sues for, whether for damages or the specific property, or both, and then he is to state the facts that sustain his claim, "clearly, explicitly, and briefly as possible." He might begin his declaration thus· "The plaintiff states, that on the 1st day of January, 1884, the defendant ejected him from his land," etc, and after stating all the facts as above, then conclude thus "wherefore, the plaintiff sues the defendant for one thousand dollars damages"

There is no necessary form of beginning or ending, nor any particular words appropriated to the expression of particular ideas. You may state, for instance, that the defendant ejected the plaintiff from his land, or that he turned him out of the possession, or expelled him from the possession

§ 15. If the injury to the plaintiff arises out of a trespass committed on lands belonging to him, or in his possession, the declaration would be in the following form:

Declaration No. 20.

A B, v. C D } CIRCUIT COURT, WILSON COUNTY
January Term, 1887

The plaintiff sues the defendant for five hundred dollars, as damages for a trespass by him committed on the 1st day of December,

1886, and on divers other days, on the following tract of land belonging to (*or in the possession of*) the plaintiff, viz situate in Wilson county, on Spring creek, in district No 2, and bounded as follows Beginning at a cedar, etc (as in Form 19), and for cutting the timber, tearing down the fences, treading down the grass and corn, destroying the sheep, etc (setting out any damage done, and any conduct that may aggravate the trespass)

ROBERT HATTON,
Attorney for Plaintiff

By referring to the form of a declaration for a trespass on land, given in 2 Chitty's Pleading, 866, the difference will be seen between the foregoing and the common-law form. That in Chitty commences thus. "A B complains of C D, etc, of a plea of trespass" All declarations at the common law we have seen had this commencement, only varying in the statement of the form of action, this being an action or "*plea of trespass*" It then proceeds as follows. "For that the said defendant on, etc, with force and arms, etc, broke and entered divers, to wit: two closes of the plaintiff situate in," etc, here follows a statement of the gates he broke, and the value of them, and each item of property he injured, with the value thereof, and then concludes, after a verbose description of everything that was done, with a statement of the whole amount of the damages sustained by the plaintiff.

The form given above (No 20) states the names of the parties in the margin, and then that the plaintiff sues the defendant for five hundred dollars as damages for a trespass by him committed at certain times on the plaintiff's land, and for cutting the timber, and for whatever other injuries he may have done This language just as clearly expresses what was done by the defendant as the language of Chitty The lawyer understands it as well, and the unprofessional man much better. To say that a man *trespassed on the plaintiff's land*, conveys the same

idea to a lawyer as to say that "*with force and arms he broke and entered the close of the plaintiff*," and to the jury it really conveys the legal idea which these technical words are intended to convey much more clearly, and certainly if it conveys the legal idea to the jury more clearly, and to the judge as clearly, it is a better form of declaration There is no necessity for any force and arms, or any breaking, in the common acceptation of those terms, to constitute a trespass. "The *close* of the plaintiff" conveys no idea to the juror He would rather understand it to be a visible inclosure, whereas it means the land included in certain boundaries, whether visible or invisible It is a term not now used by lawyers to convey the idea, nor by the people, and ought not for that reason to be used in declarations when a more familiar word equally well conveys the legal idea

The language of the above form, "for a trespass by him committed on the plaintiff's land," expresses the act complained of, an unwarrantable entry on the plaintiff's soil (2 Bl Comm. 209), as clearly and with as much legal accuracy, and with far more commendable brevity, than the common-law forms Brevity, *clearness*, and *accuracy*, are the very soul of good pleading

The plaintiff in the above declaration sues for five hundred dollars as damages, not only for trespassing on his land, but "for cutting the timber, turning his cattle upon it, and by them eating up his wheat, corn, grass," etc, and for whatever other damage may have been done The *quantity* of the thing destroyed, as the quantity of timber, and the *value* of each, are stated in Chitty, and are usually required in the common-law forms. But the form given above does not state the quantity or value, and as there is, necessarily, uncertainty about both, and as the plaintiff may recover for whatever quantity or value he may prove, there would seem to be no necessity for stating either in the declaration.

The description of the land is the same as in the declaration in ejectment This, as well as ejectment, is a local action, and the land must appear, in the declaration, to be in the county in which the suit is brought.

§ 16. But the plaintiff may be injured in his person and character, as well as in his property, and for such injuries he is entitled to sue A few forms of declarations in such cases will be given. In the case of an assault and battery, the plaintiff's declaration may be in the following form

Declaration No. 21.

A B
v
C D } CIRCUIT COURT, WILSON COUNTY
January Term, 1886

The plaintiff sues the defendant for five hundred dollars as damages, for assaulting and beating the plaintiff on the 25th day of December, 1885 ROBERT HATTON,
Attorney

This is sufficient, unless the plaintiff wishes to recover special damages, that is, such as are not the ordinary and natural result of the assault and battery, as the loss of an eye, the loss of time, medical expenses, etc. These special injuries enhance the damages, and in order that the plaintiff may prove them on the trial, they must be stated in the declaration.

If the action is for false imprisonment, the declaration may be as follows.

Declaration No. 22.

A. B
v
C. D } CIRCUIT COURT, WILSON COUNTY
January Term, 1887

The plaintiff sues the defendant for one thousand dollars, as damages, for maliciously, illegally, *and without probable cause*, arresting and imprisoning him, from the 25th day of December, 1886, to the 30th day of December, 1886 ROBERT HATTON,
Attorney

The declaration may say, "for one hour on the 25th day of December, 1886." To stop a man on the road, to

keep him in a house or jail, is an imprisonment, and it is as much a breach of his right of liberty as an assault and battery is of his right of personal security If he did it by virtue of process, or for any other lawful reason, the defendant must plead it. If the defendant did it under void process, it is no justification; the officer, the person who issued it or had it issued, and all their assistants, are liable to the action. If it was valid process, the officer and his assistants are justifiable, but the procurer of it is liable to an action for malicious prosecution if it was malicious and without probable cause It does not matter whether the process was void or valid, if it was malicious and without probable cause

If the action is for malicious prosecution, the declaration should be as follows:

Declaration No. 23.

A B, C D } CIRCUIT COURT, WILSON COUNTY.
January Term, 1887

The plaintiff declares that on the 1st day of June, 1886, the defendant without probable cause,[66] falsely and maliciously procured one E. F, a justice of the peace for Wilson county, to issue a State's warrant against the plaintiff on a charge of stealing the defendant's gold watch On the 2d day of June, 1886, the plaintiff was arrested under the warrant, and held in custody until the 10th day of the same month, when he was brought before the said E F for examination, who, upon examining the charge, discharged the plaintiff Whereupon the defendant abandoned the prosecution, and the same is wholly ended Therefore the plaintiff sues the defendant for five thousand dollars, as damages for said false and malicious prosecution

ROBERT HATTON,
Attorney for Plaintiff

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66. This form of declaration, as given by the author, did not contain the words "without probable cause" Recent adjudications of the Supreme Court of Tennessee hold these words essential in an action for malicious prosecution to the statement of a good cause of action They are equally essential in an action for false imprisonment Evans *v* Thompson, 12 Heisk 535, 2 Chit Pl 856, 857, Turner *v* Turner, 1 Pickle, 387

If the action is for slander, the declaration may be in the following form:

Declaration No. 24.

A B
v } CIRCUIT COURT, WILSON COUNTY
C D *January Term*, 1887

The plaintiff sues the defendant for five thousand dollars, as damages for falsely and maliciously charging the plaintiff with perjury, by speaking of and concerning him in the presence of divers persons on the 25th day of December, 1886, and at divers other times, in substance as follows "He is a perjured man"

ROBERT HATTON,
Attorney for Plaintiff.

By reference to the form, 2 Chitty Plead. 638, 9th Am., 6th Lond. ed, the difference will be seen in this simple and intelligible form and the verbose common-law form, and yet this contains all the substance that can be found in that. Both forms are for words *directly* accusing the plaintiff of perjury or other crime If the words do not expressly charge the crime, but are intended by the plaintiff to charge it, then the facts which show that intention are to be stated[67] Suppose the words were these. "He swore a lie" Now, to swear a lie is not perjury, unless it is in some judicial proceeding, and it must be shown in the declaration that the defendant meant to charge the plaintiff with swearing a lie in some judicial proceeding. This is done by stating that there had been such a proceeding in which the plaintiff had given evidence, and that it was in reference to that evidence that the plaintiff uttered the words. This statement is called the *inducement.*

The form may be seen in 2 Chitty, 637. If any such statement be now necessary, the above form will do, to

67. 1 Chit Pl. 400, Williams *v* Karnes, 4 Humphr. 9, Stanley *v* Bret, Mart. & Y 222

the words "in substance as follows," and then proceed thus:

"'He swore a lie' The defendant spoke these words in reference to the evidence which the plaintiff had given on oath as a witness on the trial of a suit in the Circuit Court of Wilson county, at the May term, 1886, between E F, plaintiff, and G H, defendant"

It was formerly the rule in Tennessee, and it may yet be considered necessary, to state in addition to what is above stated, that the evidence given by the plaintiff in the suit was material [68]

The form for such a case in 2 Chitty, 637, does not contain that allegation There it is merely stated that the plaintiff was sworn and gave evidence on a certain inquisition of damages, and that the slanderous words were spoken in reference to the testimony he gave The only object in referring to the suit and plaintiff's having given evidence in it, is to show that the defendant meant to charge him with having sworn a lie in a judicial proceeding [69]

But if it be necessary to show that his testimony was material, it may be done by adding the following statement:

"In which suit it became material to inquire whether a certain bay horse was bought by the said G H of the said E F, and the plaintiff's testimony was material to the decision of that question"

In the common-law forms, a *colloquium* was always stated, that is, the words were spoken "in a certain discourse which the defendant then and there had." In addition to this, it was stated that they were spoken "of, and concerning the plaintiff" Our form retains the latter statement, but eliminates the *colloquium* So a *colloquium* was stated where an inducement was introduced to make the words amount to a charge of crime. Thus,

68. Witcher *v.* Richmond, 8 Humphr. 437, Cannon *v* Phillips, 2 Sneed, 187.

69 1 Chit. Pl 400

in the above form, where it is alleged the words "he swore a lie" were spoken in reference to evidence that had been given in a lawsuit, it was always stated that the words were spoken "in a certain discourse which the defendant had of and concerning that suit, and the evidence which the plaintiff had given therein."

There was also an *innuendo* in the common-law forms which was a sort of running explanation of the meaning of the words spoken Thus "he (*meaning* the plaintiff) is perjured" This is evidently useless after the allegation that the words were spoken "of and concerning the plaintiff."

In Tennessee, the Code provides that "it is sufficient to state in the declaration in slander and libel, that the defendant falsely and maliciously charged the plaintiff with perjury, larceny, or other crime, as the case may be, in substance as follows, setting it out"[70] If that is sufficient, nothing more is necessary, and the inducement, *colloquium*, and *innuendo*, are abolished, and the plaintiff, instead of setting forth the extrinsic facts in his declaration, which would show words to be slanderous which are not so on the face of them, would show it in the evidence. So far as the facts had to be stated in the inducement, to make the words refer to the plaintiff, there can be no doubt it is abolished But the inducement may be still necessary where the words are not actionable of themselves. Without the inducement in such case, no actionable words would appear in the declaration.

If the action is for libel, the following declaration is sufficient:

Declaration No. 25.

E F
v
G. H } CIRCUIT COURT, WILSON COUNTY
January Term, 1887

The plaintiff sues the defendant for five thousand dollars damages for falsely and maliciously publishing of and concerning him,

70. § 3607, M. & V.

on the 1st day of October, 1886, in the Cedar Snag, a paper published at Lebanon, Tennessee, the following false and defamatory matter with intent to defame the plaintiff, to wit "He has committed perjury"

R H,
Attorney for Plaintiff

If the libel was in a book, give its name; if in a letter, say, in a letter written to A. B., or you may say, "in a writing written by him" (the defendant).

The common-law form does not state in what manner the libel was published, and this may, in many cases, be the most convenient form of declaration, thus

Declaration No. 26.

E. F
v.
G H

CIRCUIT COURT, WILSON COUNTY.
January Term, 1887

The plaintiff avers that the defendant did on the 1st day of July, 1886, maliciously compose and publish of and concerning the plaintiff, a certain false, scandalous, and defamatory libel, containing, among other things, the false, scandalous, and defamatory matters following, of and concerning the plaintiff, viz "He has committed perjury" The plaintiff therefore sues the defendant for five thousand dollars damages

R H,
Attorney for Plaintiff.

This form is taken from 2 Greenl. Ev, § 410, note The few forms contained in the notes in that volume are excellent common-law forms, and may be adopted with very little elimination in most of the States.

Words are sometimes false and malicious, but they are not actionable in themselves. Some special injury, however, results from them, and the plaintiff is entitled to an action on account of that injury. In that case, the plaintiff has to state in his declaration, 1 That the defendant did falsely and maliciously speak and publish of the plaintiff the words. 2. That by reason thereof, the damage complained of befell him, as that he lost the sale of his land, or he lost his customers as a merchant or mechanic, or that a lady to whom he was engaged to be married rejected him

§ 17. The very narrow limits prescribed for this work forbid the introduction of any more forms or further explanations of the declaration. But it is proper before concluding this chapter to notice other steps which the plaintiff *may* in certain cases, and *must* in others take, before the defendant puts in his defense.

It has been seen that the plaintiff, under the rules of practice in Tennessee, must file his declaration within the first three days of the appearance term. By the same rules the defendant is allowed two whole days after the three days allotted to the plaintiff, within which he must make defense to the declaration. Similar regulations exist in all the States.

If the defendant does not answer the declaration within the time allowed him by law, judgment by default may be taken against him.[71] The plaintiff's attorney moves for judgment by default, and directs the sheriff to call the defendant, and when he is called by name, the attorney directs the sheriff to make the following announcement:

"Come into court and defend the suit brought against you by A. B, or judgment by default will be taken against you"

The judgment is *final*, when the amount is ascertainable by simple calculation from the papers,[72] and it is at once entered on the minutes of the court, thus:

A B. } **Final Judgment.**
v
C D }

On motion of the plaintiff the defendant was solemnly called to come into court and defend this suit, but failed to do so; it is therefore adjudged that the plaintiff recover of the defendant one thousand dollars, the amount due on the note declared on, and also the costs

In any other case the judgment is *interlocutory*, and is the same as the above to "defendant;" then proceed:

71. § 3667, M & V
72. § 3668, M & V, Masonic Association v. Cook, 3 Head, 313.

"His damages to be ascertained by jury at the present term "(*a*)

A judgment by default may be set aside at any time during the term at which it is rendered on motion of the defendant supported by affidavit, showing a good defense and a good reason for not having pleaded in time And if an interlocutory judgment is continued for the assessment of damages or other cause to a subsequent term, it may then be set aside on motion.[73] For until the judgment is final, the parties are in court attending to the case, and there is no use for any more formal proceeding than motion to bring them in But after the term at which final judgment is rendered, they are out of court, and the only way to have the judgment set aside is by the writ of error *coram nobis*

Should there be no court, the parties still have to file their pleadings with the clerk.[74] And if the court should adjourn before the time for pleading elapses, they must file them with the clerk in vacation within the same time that would have been allowed if the court had continued in session. And if either fails to do so, his adversary can have the advantage of his judgment by default or of dismissal on the first day of the next term

If the suit be by original attachment, and the debt sued for be not due, the plaintiff is not required to file any pleading until its maturity; but if the debt be due then upon the levy of the attachment on property, the return thereof and publication, the case proceeds as upon personal service of process.[75] If the defendant fails to appear, judgment by default may be taken against him,

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(*a*) A judgment by default for the want of a plea, and a judgment of dismissal for the want of a declaration, are taken in the same way, and the reader is referred to Chapter V, *post*, for a more particular description of the proceeding

73. Bank *v.* Shillern, 2 Sneed, 198

74. Morrow *v.* Malone, 5 Sneed, 643, Byrd *v.* Bank, 3 Swan, 43.

75 §§ 4265–4267, M & V.

just as if a summons had been executed. His pleading in time to the declaration is the only evidence of his appearing, and it is, in fact, appearance He is not seen, except in his plea The old form of the entry of judgment by default is, that he was called to come, and "came not;" he was not there, he was legally invisible, because he did not plead, although he was corporally present. He might have appeared before in motions and preliminary steps, but his appearance has ceased.

In an action of ejectment, unlike other actions, the declaration is filed at the commencement of the suit, and a copy of it is served upon the defendant at the time the summons is served. The defendant is required to answer the declaration within the first three days of the appearance term, and if he fails to do so, judgment by default may be taken against him [76]

§ 18. The plaintiff or the defendant may die after the commencement of the suit, but no action, unless it be for a wrong affecting the character of the plaintiff, abates by the death of either party. It will be discontinued, however, if not revived by or against the representative or successor in interest of the deceased [77] The first step, either toward a revivor or discontinuance, is to suggest the death on the record and prove it, if not admitted by the party or his successor. Not until after the second term, after such suggestion and proof or admission entered on the record, can the suit be abated or discontinued. The right to revive continues through the whole of the second term, and no order of abatement can be made until the third term.[78]

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76 § 3965, M & V.

77. § 560, M & V In Bolin *v* Stewart, 7 Baxt 299, it is directly held that "malicious prosecution" is an action for wrongs affecting the character of the plaintiff, and abates on suggestion and proof of the death of the defendant

78. § 3561, M & V., Cranch *v.* Hopper, 5 Lea, 171, Churchwell *v* Bank, 1 Heisk. 780

If a sole plaintiff dies, his death may be suggested by his attorney or representative, or by the defendant, and proved and entered Then his representative may revive the suit within the two terms allowed. If he does not, the defendant may, on motion, have it abated at any time thereafter. But at any time before it is abated, even after the two terms have elapsed, the representative may revive it [79]

If one of several plaintiffs dies, his representative may revive, on motion, and become a coplaintiff at any time before the suit is abated or tried. If he does not, the defendant may revive it against him or elect to proceed to trial with the surviving plaintiff or to abate the suit But he does not have this election to abate where the interest of the deceased party becomes extinct by his death, or survives to his coplaintiffs, as in the case of partners When a partner dies, his interest survives in law to the surviving partner. So, if one of two executors or administrators dies [80] If a sole defendant dies, the plaintiff may suggest his death, and revive the suit against his representatives, or it may be done by the attorney or representative of the deceased If one of several defendants dies, and the plaintiff had his election originally to sue one or more of them, he may suggest the death, and proceed at once against the survivors, or at his election revive the suit against the representative of the dead party.

It may be well, in this connection, to explain who are the representatives of a dead party. Usually, the term "representative" means only the administrator or executor. They are sometimes called "personal representatives," because they represent the personal estate of the deceased person. But the heir is also a representa-

79 Brooks *v* Jones 5 Lea, 245, Young *v.* Officer, 7 Yerg 137; Holland *v* Harris, 2 Sneed, 68.

80 §§ 2818, 3564, 3565, M. & V.

tive, and because he takes by inheritance the lands of the deceased ancestor, he is sometimes called the "real representative." So, if it is an estate of inheritance sued for, the heirs of the plaintiff or defendant are his representatives, and the revivor should be by or against them. If it is a suit for personal property or debt, or damages, the administrator or executor is the representative of the deceased. But even in this case, if no one will administer on the estate, the suit may be revived by or against the heir.[81]

If, pending the suit, a party has parted with his interest, or dying, has left a will devising it to another, the action may be revived by or against his successor in interest; indeed, against any one who may be legally entitled to the party's place in relation to the subject-matter of the litigation.[82]

An administrator or executor, qualified in one State, cannot, by virtue of such appointment, sue or be sued in another State; nor can a suit be revived by or against him in any other State than that of his qualification. A foreign administrator or executor, however, going into another State, may be sued there as *trustee*, and held to account for the trust estate brought by him within that jurisdiction.[83]

If the representative of the plaintiff wishes to revive, he produces his letters testamentary or of administration, or proves his heirship or interest acquired, and on motion, is admitted as plaintiff. If the plaintiff wishes to revive against the representative of the deceased he moves for a *scire facias* against him on suggestion that he is the proper representative or successor; and upon the return of that, if it does not appear that he is not the representative, the

81 § 3562, M & V., Campbell *v.* Hubbard, 11 Lea, 6, Boyd *v.* Tilzer, 6 Coldw. 568. Brown *v.* Rocco, 9 Heisk. 187.

82 § 3563, M & V.

83 Alsup *v.* Alsup, 10 Yerg. 283, Young *v.* O'Neal, 3 Sneed, 55; Campbell *v.* Hubbard, *supra*.

suit is revived against him. He may, however, come in and consent to the revivor without *scire facias*.

A *scire facias* is a very common writ It is mesne, intermediate, or judicial process, reciting facts, and giving the party notice to come and answer them. It may be answered by affidavit, plea, demurrer, or motion to quash, according to circumstances.

The writ may be in the following form:

STATE OF TENNESSEE.

To the Sheriff of Wilson County:

A suit is pending in the Circuit Court of Wilson county between A, plaintiff, and B, defendant It is suggested of record and admitted that the defendant is dead, and it is further suggested by the plaintiff that C is the administrator of the defendant You are therefore commanded to make these facts known to C, so that he may appear at the Circuit Court of said county, at Lebanon, on the fourth Monday in July next, to show cause, if any he has, why the said suit should not be revived against him as administrator of B, deceased

Witness my hand this fourth Monday in March, 1887

S G STRATTON,
Clerk

The writ is to be executed by reading or offering to read it to C, and returned as other process. On its return, the plaintiff moves to revive against C, which C. may resist upon any legal and sufficient ground If he denies that he is administrator, the fact may be proved by a copy of the record of his appointment.

When a nominal party dies the suit goes on without revivor. Such a party has no power to dismiss or control the suit, and it will not abate on his death.[84]

When a female plaintiff marries, her husband may make himself a coplaintiff by motion. But then he has to give bond and security for the prosecution of the suit, which discharges the original security from liability for

84 § 3569, M & B, Burton *v* Dees, 4 Yerg. 7 But this rule, it is said, has no application to courts of equity Morrison *v.* Deadrick, 10 Humphr 342, 1 Lea, 5.

subsequently accruing costs.[85] If a female defendant marries, the suit may be revived against her husband at any time before the final disposition of it, on motion, if he consents, and by *scire facias* if he does not.[86]

If the suit is commenced in the joint names of husband and wife for any cause of action in which it is proper to sue in their joint names, and where the action would survive to the wife, the husband is not allowed to dismiss it without her consent, given in open court, or upon her written order filed with the clerk, and attested by two witnesses personally known to him.[87] This would comprehend every debt or other cause of action that accrued to the wife before the marriage, and every wrong done or right accruing to her during the coverture, except contracts with her The husband may appropriate the benefit of such contracts to himself, and may sue alone upon them or join his wife. When he has chosen to commence in his name jointly with hers, she has a right to continue the use of his name in spite of him[88] So, it would seem, if she has commenced in her own name before the marriage, she may go on alone.

This is not the only case where one may use another's name against his will. It is a general principle that where there is a joint right, and one will not agree to sue, the other may use his name. It is so at least in joint contracts[89] And it should make no difference whether the right is secured by the general law of the land, or the special contract of the parties. So where a creditor has transferred a debt without a legal assignment, he cannot resist the use of his name by the transferee[90]

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85 § 3572, M & V
86 § 3573 M & V
87 § 3352, M & V.
88. 1 Chit Pl 29-33.
89 Gray *v* Wilson, Meigs, 395 But see Woods *v* Owens, 2 Swan, 146.
90. Wright *v.* McLemore, 10 Yerg 235, and cases cited

CHAPTER V.

MOTION, PLEA IN ABATEMENT, AND DEMURRER.

§ 1. In this and the two succeeding chapters will be given a history of the various steps subsequent to the declaration that may be taken at the appearance term, first by the defendant, and then alternately by the plaintiff and defendant, until an issue has been reached in the pleadings. Motions, pleas in abatement, and demurrers will be treated of in this chapter

The defendant is not required to make any defense to the action brought against him until the plaintiff has filed his declaration, which, as has been seen, he must do within the first three days of the term to which the summons is returned executed. The defendant has two whole days after the three days allowed the plaintiff within which to consider of and make his defense This he does first, by motion, then by plea in abatement, then by demurrer, and finally by plea in bar This is the order of pleading existing at the common law, and it should be observed, because an advance step in pleading waives all defenses which should be antecedently made.[1] This rule of the common law has been modified by statute in Tennessee, so that a plea in bar is not a waiver of a plea in abatement, but both may be pleaded and heard at the same time.(*a*)

§ 2. MOTIONS are made in open court, and are usually unwritten, but the court may require them to be reduced to writing. If the defense is made in any other manner than by motion it must be reduced to writing, signed by an attorney-at-law, and marked "filed" by the clerk of the court.

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1 1 Tidd Pr 630; 1 Chit Pl 441; Snap *v* Moore, 2 Tenn 240, Shepherd *v* Bank, 2 Tenn Ch 17; 2 Yerg. 127, 8 Yerg 467.

(*a*) Acts 1897, chap 121, § 2.

If the plaintiff fails to file his declaration within the time allowed, the suit may be dismissed on *motion* of the defendant.[2]

This motion may be made at any time allotted by the rules of court for making motions after the plaintiff's default. The roll of attorneys is called every morning, for the purpose of enabling them to make motions. As the plaintiff is allowed the three first days of the term to file his declaration, the morning of the fourth day is the earliest time for the motion to dismiss.

The right to dismiss on motion vests in the defendant by the plaintiff's negligence, and it continues as long as the negligence continues; so the defendant may make the motion not only on the fourth morning of the term, but if he fails then, he may make it on the fifth, and so on, from day to day, until the plaintiff cuts off the right by filing his declaration, which may be done at any time before the defendant has made the motion to dismiss

The motion consists of an oral statement made in open court by the defendant's attorney, containing the statement of two essential facts. first, that the summons was issued and served upon the defendant five days or more before the first day of the term, and, second, that the plaintiff had failed to file his declaration within the first three days of the term, which statement should be followed by a formal motion, as "the defendant therefore moves the court that the plaintiff's suit be dismissed" The facts stated by the attorney in the absence of objection are usually taken as true; if denied, they may be made to appear true, by the production of the summons and the indorsements on it, and the statement of the clerk of the court that the declaration has not been filed in his office. The court announces its *ruling*[3] upon the motion by saying

2. § 5010, M & V

3 *To rule* means to *decide* or *settle* Rap & Lawr Law Dict So the expression in the text is equivalent to "the court announces its decision."

the motion is "allowed" or "sustained," and directs the defendant's attorney to "call out" the plaintiff.

We do not suppose the solemn form of "calling out" the plaintiff to be absolutely necessary. He is in default by not filing his declaration; for, having commenced his action, the law requires him to prosecute it by taking the necessary steps, and it would seem not to be necessary for the defendant to solemnly call him to do what the law enjoins on him. But there may be intrinsic virtue in it. The manner of proceeding is as follows: The defendant's attorney, addressing the sheriff, directs him to make proclamation, which he does in these words: "O yes, O yes, A. B" The attorney then directs him what further to say, which is in these words: "Come into court, and prosecute your suit against C. D., or it will be dismissed"

The plaintiff may so far obey this call as to come into court; in fact, he may be sitting there all the time; but he must do the thing he is called to do, that is, he must prosecute his suit. This he can only do by filing a declaration To prosecute a suit is to take the steps which are necessary to carry it on, the first of which, after the return of the writ, is the filing of the declaration. As he is called to come and file his declaration, it would seem that he might come and file it, although he had neglected to do so before It would be mockery to call him to do a thing, and then not let him do it The legal effect of the call, which assumes that the plaintiff has failed to prosecute his suit, is to furnish satisfactory evidence that he has no good reason for his default, else upon this solemn call he would appear and show it

The judgment of the court upon the motion to dismiss, and indeed whatever the court does in a lawsuit, must be entered on the records or *minutes* of the court

A brief reference to the entries that must appear in the minutes may be of value to the student, and the reference will be as appropriate here as elsewhere. The first

entry that appears on the minute-book at the beginning of each term of the court is called the Caption of the Record or Minutes, and it may be in the following form:

STATE OF TENNESSEE — WILSON COUNTY

Be it remembered that a Circuit Court (or Special Term of the Circuit Court, called by authority of law), commencing on the second Monday in January, 1887, was held in and for the county of Wilson, at the courthouse in the town of Lebanon, by Honorable W H Williamson, judge of the Seventh Judicial Circuit (or Honorable W S McLemore, judge of the Ninth Judicial Circuit, presiding by interchange, or by Honorable E E Beard, duly appointed and commissioned to hold said court), when the following proceedings were had, to wit

This caption shows by its affirmative statements four important facts, which are essential to give validity to the proceedings of the court:

First. THE NAME OF THE COURT. This is necessary that it may be seen it was a court of competent jurisdiction

Second. THE TIME WHEN THE COURT WAS HELD. Some general statute fixes the time for holding the regular terms of courts, and the authority which appoints a Special Term fixes the time when it shall be held If the court should sit at a different time from that fixed by the statute, or by the appointing power, its proceedings would be without validity. If the caption is wholly silent as to time, *possibly* there may be an inference that the court sat at a time authorized by law.

Third. THE PLACE WHERE THE COURT WAS HELD. This is necessary for the same reasons requiring the statement of time.

Fourth. BY WHAT JUDGE. This is necessary that it may be seen the officer holding the court is one designated by the law as having competent authority.

The substance of these several propositions is that it is necessary to show in the caption that a competent judge

was present at the time and place designated by law, and that then and there he opened and held a court having competent jurisdiction to conduct the proceedings and dispose of the business.[4]

All entries on the minutes made on the first, or any succeeding day of the term, are connected with the caption, each entry constituting a part of the "proceedings had" If a transcript of the proceedings in any particular case disposed of during the term were required, the clerk, whose duty it is to make such transcripts, would begin with the caption, and follow that with the entry or entries made in the particular case There may be proceedings had in a particular case at many terms of the court, but in making a transcript thereof, the caption of the minutes of the term during which the case was finally disposed of should be used.

As before stated, every step taken by the court in a lawsuit must be entered on the record When a motion is made, whether it is sustained or overruled, the motion and the action of the court upon it must be entered by the clerk on his record-book, which we briefly call the *minutes,* or minute-book. These entries, like the pleadings, ought to be clear, explicit, and as brief as possible. They contain the only history of the cases that can be judicially relied on. They ought to show the facts that occurred, and then the judgment of the court upon those facts The facts are the premises, and the judgment of the court the conclusion from them If the judgment pronounced is a legal inference from the facts stated, then there is no error in the record. A particular form is no more necessary in entries than in pleadings. If the language used conveys the idea of what was done with "reasonable certainty of meaning," it is sufficient. But when particular forms

4 Comyn Dig., vol 4, p 672, note *h*, Cornwall *v.* State, Mart & Y 163; Peck, J., dissenting opinion.

have been long used to express the facts and the action of the court in particular cases, they acquire a certainty of meaning which rarely belongs to new forms, unless they are drawn by a skillful hand But changes in the law require changes in the forms of entry. The general spirit of the law requires as much brevity and simplicity as possible in all judicial proceedings, and that they should, as far as possible, be rendered intelligible to common men.

In accordance with these rules, the motion to dismiss for the want of a declaration having been made and sustained as hereinbefore explained, the entry on the minutes should be in the following form:

Judgment of Dismissal.

A B
v.
C D

The defendant, by attorney, moved the court to dismiss the plaintiff's suit for the want of a declaration The plaintiff was thereupon called to come and prosecute his suit, but he failed to do so It is therefore adjudged by the court that the plaintiff's suit be dismissed, and that the defendant recover of him the costs of this cause (or of him and E F., surety in the prosecution bond, the costs of the cause)

It is not necessary to add to this form the usual conclusion "for which execution may issue." This is surplusage.

The law awards an execution upon pronouncing the judgment, without application to the court, or an order of court therefor. In the English common law it only issued upon motion of the party, and by order of the court, which was called *awarding* execution In the practice of this country, the rendering of the judgment awards execution, not only the original, but *alias* and *pluries* executions, until the judgment is satisfied.[5]

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5. Daley *v.* Perry, 9 Yerg. 442, Union Bank *v.* McClung, 9 Humphr. 96.

§ 3. Some other grounds upon which a motion to dismiss the plaintiff's suit may be founded, will now be noticed:

First. The law in Tennessee, and in many other States, requires that the plaintiff give a bond with surety for costs, or, in cases allowing it, take the pauper's oath, before commencing his suit If he has failed to comply with this requirement, the defendant may move to dismiss the suit. But the plaintiff will be allowed then to give the bond or take the oath. Either being done at any time before final judgment upon the rule, there can be no reason for dismissing the suit because it was not done earlier [6]

Second. If a bond has been given, but it is so defective that judgment cannot be rendered on it, the suit may be dismissed by motion on that ground. But in this case, judgment on the motion may be avoided by an amendment of the bond, and a new acknowledgment thereof by the surety, or by the execution of a new bond with sureties, in the form required by law, or by taking the pauper's oath.

Third. If the amount of the bond is not sufficient to cover the probable costs of the litigation, or the amount of the bond being sufficient, and the solvency or ability of the surety to discharge a judgment on the bond be doubtful, the defendant may make *this* fact appear, either by his own affidavit, or that of some other person. The court will then make a rule on the plaintiff to justify his present security, or to give other security by a given time, or his suit will be dismissed. The security may justify himself, that is, he may swear to what he is worth after the payment of his debts, and thereby show his sufficiency. Or, his sufficiency may be shown by the affidavits of other persons.

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6 § 3911, M & V , Sharp *v* Miller, 3 Sneed, 42 It may, indeed, be reversible error in the court to refuse the security if properly tendered even after judgment on the motion, but before the adjournment of the term Irvin *v* Mathis, 11 Humphr 603, note 1.

It has to be shown, however, or new security given, or the suit dismissed.[7]

In all these cases, reasonable time will be given the plaintiff, at his request, to give the required prosecution bond and security.

Fourth. Suits brought by paupers, without giving security for costs, may be dismissed, on motion of the defendant, at any time before the trial, upon showing to the court, by the affidavits of disinterested persons, that the plaintiff's allegation of poverty is probably untrue, or that the cause of action is frivolous or malicious.[8] The plaintiff will be allowed to introduce the affidavits of other disinterested persons, to show that the allegation of poverty is probably true, or that he has probably a good cause of action If a good cause of action is shown, the court could not presume that it was malicious. The law does not impute malice to an action for which there was reasonable cause. But if the cause of action was frivolous, that is, if there was no reasonable ground for it, it might be *prima facie* evidence of malice, at all events, the suit would be dismissed. If, however, the plaintiff were to give bond and security for the costs, he might still prosecute the suit. He comes within the general description of those who have commenced suits without giving bond, and we have seen that they may give bond and proceed. The evidence would have to be very clear and one-sided that the cause of action was frivolous, to justify the dismission of the suit on that ground alone.

If the suit is dismissed, judgment is to be rendered against the pauper for the costs.[9]

Fifth. For Defects in the Writ. The strictly proper legal way of taking advantage of defects in the writ is by plea in abatement, which sets forth the defect com-

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7 § 3911, M & V
8 § 3915, M & V.
9 § 3916, M & V

plained of, and prays that the writ be abated or quashed. But a practice has grown up of moving to quash the writ, or, what is the same thing in effect, to dismiss the suit on account of these defects The writ is a part of the record, and the court needs no plea to bring to its knowledge defects which appear on the face of it. It is just as convenient to act upon them on motion as upon a formal plea.

We have analyzed the writ, and directed attention to its various parts. The defendant's attorney has only to examine each part of it, and apply to each the legal tests of its sufficiency, and move to quash it if it will not stand these tests There is,

1. The *style* of the writ: "The State of Tennessee."
2. The *address*· "To the Sheriff of Wilson County."
3. The *command* "Summon."
4 The party defendant: "James Hart."
5. What he is to do: 1. To appear. 2. At Circuit Court. 3. Of Wilson county. 4. At what term. 5 To answer the suit. 6. Of the plaintiff, A. B.
6. The attestation by the clerk.

If in any of these essential parts the writ is substantially defective, it may on motion be quashed.

It is true that "no summons, writ, pleading, process, return, or other proceeding in any civil action in any court shall be abated or quashed for *any* defect, omission, or imperfection.[10] But this merely means that they may be amended; the thing omitted may be supplied; the thing defective or imperfect may be made perfect by amendment. This may be done after a motion to quash the writ is made or before. The rule allowing amendments is very liberal, and, if the writ is not absolutely void because of the absence of essential parts, it may be amended But if it is wanting in the essentials of a writ, then it is a nullity, and of no more effect than

10. § 3574, M & V

a blank piece of paper, and it cannot be converted into a writ by amendment. The style, the teste, and the signature of the clerk are essential parts of the process, and if these, or any one of them, be absent, the defect cannot be cured by amendment.(*a*)

If the requisite qualities are in substance embodied in the writ; that is, if the face of the writ itself, without any help from affidavits, shows that what the law requires, was intended to be embraced in it, however awkwardly, obscurely, or inartificially, there is no necessity for an amendment. The court may direct it to be amended for the sake of perspicuity and order, but will not quash it [11]

If the suit is dismissed for any of the causes before mentioned, it may be reinstated at any time during the same term upon the plaintiff showing good reason by affidavit for the default, and doing the thing, the want of which caused the dismissal. The law favors a liberal policy in allowing parties to prosecute actions for their rights, and no suit should be dismissed for want of a prompt compliance with a rule as to costs, provided the rule be complied with in a reasonable time.[12]

§ 4. There are other grounds for motions to dismiss, but such others as will be noticed come more appropriately under the head of pleas in ABATEMENT, and defenses by this mode of pleading will now be briefly discussed as being next in the regular order. When a cause is brought into court it is the right and privilege of the defendant that he be sued in the right way; and there is a corresponding duty on the part of the defendant's attorney to demand that this be done. That a particular defense may be only dilatory in character, and that it may be avoided by amendment or otherwise, will not excuse the attorney from relying upon it if it will con-

(*a*) 9 Baxt 581, 17 Pickle, 686

11. § 3577, M. & V.

12 Sharp *v* Miller, 3 Sneed, 42.

fer any benefit upon his client, to which, under the rules of law and good conscience, he is entitled. And, indeed, if there be no benefit accruing to the client, the consistency and permanency of the rules by which causes are brought to a hearing, and which are so essential to the administration of justice, are sufficient reasons why every lawyer should demand of his adversary the proper use of the instrumentalities provided for the assertion and defense of rights (*a*)

The object of a Plea in Abatement is to quash the writ, or in effect to dismiss the plaintiff's suit, and it may be either for defects apparent on the face of the writ, or for facts not so apparent, which, when made to appear, will show that the plaintiff ought not to be allowed to proceed Thus, if the writ appears to have been issued on Sunday without the necessary affidavit, this fact may be pleaded in abatement of the plaintiff's suit.[13] So where process is served on the defendant while attending an election, or as a witness or juror;[14] so if the suit

(*a*) There is a wide distinction between a *false* defense and a *technical* one which should never be overlooked by the profession Consistent adherence to the rules of pleading, and a dutiful regard to the rights of the client, may require frequent resort to the latter but never to the former A lawyer does not by his engagement with his client bargain away his conscience and he cannot do so, in such manner as to escape condemnation Zeal for the client, to be commendable must be kept within this boundary No amount of zeal would justify a lawyer in calling and examining a witness whom he knows to have been bribed to swear falsely, nor in insisting upon a demand or a defense which he knows does not exist Within the boundary lines of truth and good conscience, it is the right and duty of a lawyer to use all his learning and talents in upholding his client and defeating his adversary, but he has no right to sacrifice truth and good conscience to learning and talents that any cause may be sustained or overthrown If the propagation of false theories and the example of mercenary and conscienceless lawyers shall ever carry the boundaries of legal ethics outside the lines of common honesty, the high distinction of the profession will disappear, and its respectability as a vocation will fall before the execration of enlightened public sentiment

13. § 3529, M & V Helm v Rogers 5 Humphr 103

14 §§ 3612, 4581, 4783, M & V , Baker v Compton, 2 Head. 470 Martin v Ramsey, 7 Humphr 260 The case of Grove v Campbell, 9

is brought in the wrong county,[15] so if the plaintiff is an infant suing without guardian or next friend, or is a fictitious person, or was dead when the suit commenced, or was then a married woman, or is insane and has a guardian.[16] So misnomer of the plaintiff or defendant,[17] so coverture of the defendant sued as a single woman,[18] so for *nonjoinder* of parties plaintiff, as where two or more are co-obligees in a contract, or are jointly interested in the recovery of damages for an injury done to their common property, and all do not join in the action,[19] so if coexecutors or administrators do not join in the suit it may be pleaded in abatement,[20] so the pendency of another suit in any of the courts of the same State and for the same cause of action.[21] And in suits commenced by writ of attachment as leading process and without summons, the defendant may plead in abatement of the suit that the grounds set out in the affidavit are untrue, or that the property attached is not his.[22]

There are other grounds upon which to found pleas in abatement, but a further enumeration is deemed unnecessary. In general, whatever shows that the plaintiff, although he may have a right, cannot proceed on account

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Yerg. 8, is a construction of the Act (Penn.) of 1779, the language of which was changed when brought forward in the Code, or previously by amendment. If this be not so, then the cases in 2 Head, and 7 Humphr., *supra*, overrule by necessary implication, though not expressly, Grove *v.* Campbell.

15. § 3612, M. & V.

16. Comyn Dig., Abatement F., 5, 6, 16, 17; Green *v.* Harrison, 3 Sneed, 132; 7 Johns. 373; 8 Pick. 552; 1 Chit. Pl. 444, 449.

17. 1 Tidd Pr. 447; 8 Yerg. 103; 2 Taunt. 401; 2 Str. 339; 2 Cai. 362; Rex *v.* Samuel Shakespeare, 10 East, 83.

18. 3 Humphr. 80; 1 Chit. 449; 1 Tidd, 635.

19. Winters *v.* McGee, 3 Sneed, 128.

20. 1 Chit. 20.

21. 1 Chit. 454.

22. Harris *v.* Taylor, 3 Sneed, 536. So a plea in abatement, upon like grounds, will lie to an ancillary attachment, but that process not being the leading process sustaining the plea, does not abate the suit, but only discharges the attachment and restores the property to the defendant. Robb *v.* Parker, 4 Heisk. 59.

of some wrong step he has taken, or because he has not proceeded according to law may be pleaded in abatement.

The rules of pleading formerly mentioned in connection with the declaration apply to pleas in abatement Exact formality in the commencement and conclusion was formerly required But now it depends upon the facts stated, and not upon the form of stating them, what effect, if any, shall be given to the plea The statement of the facts briefly and intelligibly is all that is required. Where, from the nature of the fact pleaded to abate the present suit, the defendant can disclose another fact which would enable the plaintiff to avoid his present mistake in another suit, the plea must disclose that fact. Thus, if the defendant being sued as John Den, plead that his name is not John Den, he must state what his true name is.

Pleas in abatement are allowed *strictı juris*, and no latitude in practice is extended to them; they must always be filed in the right time, in the right place, and be properly verified, before the court will entertain them.[23] They are construed with great strictness and are not favored in the law.[24] The record may show the truth of the plea, and then it needs no other verification, but if its truth does not so appear it must be sworn to The affidavit may be made by the defendant, his attorney or agent, and it must be positive as to the truth of every fact contained in the plea, and should leave nothing to be collected by inference, it must be stated that the plea is true in substance and in fact, and if not so verified the plaintiff may treat the plea as a nullity, and move the court to have it stricken out.[25]

§ 5. Before proceeding to a discussion of the question as to what the plaintiff is to do upon the filing of

23 Grove *v* Campbell, 9 Yerg 7.
24 State *v.* Bryant, 10 Yerg 528
25. Bank *v* Jones, 1 Swan, 392, 1 Chit Pl. 402, Young *v.* Stringer, 5 Hayw 30

the plea in abatement, a few forms of the plea will be given.

If the ground of the plea is that the writ was issued on Sunday, the plea should be as follows:

Plea in Abatement, No. 1. Writ Issued on Sunday.

A B
v
C D.

The defendant, for plea, says the writ in this case was issued on Sunday, the 12th day of December, 1886, without affidavit that the defendant was removing or about to remove himself or his property beyond the jurisdiction of this court

E F,
Attorney for Defendant.

The defendant makes oath that the above plea is true in substance and in fact C D
Sworn to and subscribed before me, this 13th January, 1887
W M McCorkle,
Clerk

The truth of this plea may "otherwise appear" from the clerk's indorsement of the date of issuance on the writ, and in such event the affidavit would be unnecessary.

If the ground for the plea be coverture of the plaintiff, the following form may be used:

No. 2. Coverture of Plaintiff.

Jane Den
v
James Furlong

The defendant, for plea, says the plaintiff was at the commencement of this suit, and still is, married to one John Den, who is still living E F,
Attorney for Defendant

Affidavit as in Form No 1

No. 3. Plea of Misnomer of Defendant.

John Den
v
James Furlong
Circuit Court, Wilson County.
May Term, 1887

John Hardin, who is sued by the plaintiff by the name of James Furlong, says that his name is John Hardin, and by that name he

has always been called and known, and he never was, nor is he now, called or known by the name of James Furlong

Affidavit as above. WM. L BROWN,
Attorney

No. 4. Plea of Former Suit Pending.

John Den
v.
Richard Fen

The defendant, for plea, says that, before the commencement of this suit, to wit, on the 1st day of March, 1887, the plaintiff commenced another suit against him in the Circuit Court of Smith county, on the very same promissory note in the declaration in this present suit mentioned, as by the record and proceedings remaining in said court more fully appears And the defendant avers that the parties in this and the former suit are the same, and not other or different persons, and that the said former suit is still pending in the Circuit Court of Smith county WM L. BROWN,

Affidavit as above *Attorney*

If the suit is for specific property, as horses, you may say, "For the very same horses and damages for their detention" If for damages for the conversion of property, say, "For the same conversion of the same horses," etc.

The last plea in abatement is founded on facts which could only be disclosed in the declaration. The writ does not show what the suit is brought for, it is merely a summons of the defendant to answer the plaintiff's action; the declaration shows what that action is for; and now, when it is disclosed, the plea says the plaintiff has another action pending for the same thing. It might therefore seem that the proper effect of the plea would be to abate the declaration rather than the writ, for nothing abatable appears in the writ. But it is really the writ that is in fault; by it the suit was commenced; it brought the defendant into court, without telling him what for. The declaration tells what for; it does no more than explain the cause for which the writ issued. It is the writ therefore that ought to be abated, and when it is quashed, the declaration goes with

it. The suit is abated because the process by which it is commenced, and on which it rests, is quashed, on account of an original improper design, exposed by the declaration

§ 6. It is proper now to consider what should be the course of the plaintiff when he is confronted with a plea in abatement If he sees that the plea is true and is sufficient in law to abate the suit, he may prevent the abatement in many cases by amending his writ and declaration. If the writ in fact issued on Sunday, and that be the ground of the plea, of course there would be no remedy But if the plea is a misnomer of the plaintiff or defendant, the plaintiff may amend by inserting the true name. The names of parties may be stricken out of the writ and pleadings, or inserted in them, either as plaintiffs or defendants, so as to have the proper parties before the court. If the plea is the pendency of another suit for the same cause of action, the former suit may be dismissed, and that fact being replied, the abatement is obviated If the plea is that the plaintiff or defendant is a *feme covert*, the husband of either may be made a party, and so avoid the effect of the plea And generally in all cases where the irregularity relied upon by plea in abatement can be corrected by amendment, it may be done There can be no useful end attained in turning the parties out of court, to be brought back again at the next term, if substantial justice can be done by directing the proper amendments and allowing the parties to proceed to the end of their litigation No more appropriate opportunity arises for the liberal exercise of the discretion of a court in allowing amendments than when they are asked for to avoid a plea in abatement.

The plaintiff may *demur* to the plea, which is merely an allegation by the plaintiff that the matters stated in the plea are not sufficient in law to abate the suit. This presents an issue of law, to be determined by the court. If the question is decided against the defendant, that is, if the

demurrer is *sustained,* the judgment will be that the defendant *answer over* (*respondeat ouster*), which means that he shall answer the plaintiff's declaration by a sufficient plea.[26] If he does not do this within the time allowed, the plaintiff may take judgment against him. If the demurrer of the plaintiff is *overruled,* that is, if the court should decide that the plea in abatement is sufficient, then the judgment is that the writ be abated. But if the irregularity upon which the plea is founded can be removed by amendment, the plaintiff may yet, during the term, by leave of the court, amend the proceedings and prevent the abatement

But the plaintiff may pursue a different course If the facts set forth in the plea are sufficient to abate the writ, or have been held sufficient by overruling the demurrer, but the plaintiff believes them to be untrue, then he may, in the first instance, without demurring or after his demurrer is overruled, put the facts in issue by a plea denying them, and thus prevent the abatement by demanding a trial on the truth of the facts set forth in the plea. Take Plea No. 1 — that the writ issued on Sunday the plaintiff may reply that the writ did not issue on Sunday, or that he did make the necessary affidavit, thus·

Replication to Plea in Abatement.

A B
v.
C D.

The plaintiff, for replication, says that the writ in this case did not issue on Sunday, the 12th day of December, 1887, but on Saturday, the 11th day of December, 1887

H CRABB,
Attorney for Plaintiff

Or thus:

The plaintiff replies to the defendant's plea, that he did make affidavit before the clerk of this court, in order to obtain his writ in

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26 McBee *v* State, Meigs, 122 Rainey *v* Sanders, 4 Humphr 447, Straus *v* Wiel, 5 Coldw 120, Robb *v* Parker, 4 Heisk 70 Turner *v* Carter, 1 Head, 520, § 3646, M & V, 1 Coldw 2

this case, that the defendant was removing, or about to remove himself or his property, beyond the jurisdiction of the court

This makes an issue triable by a jury If it is found for the defendant, the judgment is that the writ be abated and the plaintiff pay the costs The effect of all pleas in abatement, if successful, is to abate or defeat the particular action; but the right of action is not gone the plaintiff may sue in a new action, avoiding the mistakes of the first.

But if the issue on the plea is found in favor of the plaintiff, the jury proceeds to assess his damages and a judgment final is rendered against the defendant The Act of 1897, chap. 121, § 1 (Tennessee) provides that a defendant has the right upon the overruling of a plea in abatement, for any cause filed by him in any action, to plead to the merits If this act means that upon the plea being overruled, by being stricken out on motion, or held bad on demurrer, the defendant may plead to the merits, then it is only declaratory of the law as it has always existed in Tennessee But if it means that after issue upon the truth of the plea, and trial thereof and verdict and judgment against him, the defendant may then plead to the merits and have another issue of fact and another verdict and judgment, it is a startling innovation, and a grave departure from the established rules of pleading and practice It is not anticipated that the courts will give the act such a construction To do so would be to permit the defendant to tender issues triable by a jury in succession, and demand separate and successive trials upon each (*a*)

§ 7. If the defendant sees no ground for dismissing or abating the suit, or if he chooses to waive whatever grounds he may have, then he may resort to a DEMURRER as the next step in pleading

(*a*) Railroad *v* McCullom, 21 Pick 623, arose under section 2 of the act referred to, and it does not settle the meaning or effect of the section discussed in the text

A demurrer is an allegation that the declaration is insufficient, and therefore the defendant is not bound to answer it.

It admits that the facts alleged in the declaration are true, but contends that they do not constitute a sufficient cause of action; that the law does not give an action on account of such facts. Thus, suppose the declaration states that the defendant falsely and maliciously said of the plaintiff, "He is a liar" The law does not give an action for such language, however false and malicious it may be Therefore, the defendant would demur to the declaration, and he would thereby admit that he did utter the language imputed to him falsely and maliciously, but would contend that the plaintiff was not entitled to recover any damages against him for it. It is not an express admission — not an admission, in fact, that he was guilty of so odious an offense in morals — but an admission in law, and for the mere purpose of disposing of the suit The demurrer amounts to this: "Even if I did falsely and maliciously say you were a liar, you are not entitled to an action for it "[27] If the defendant were to deny it by plea, and have it tried by a jury, and they were to find him guilty of the charge, and give a verdict for damages against him, the court could not render a judgment for them. So it would be a useless trouble and expense to the parties and the country

But, if the plaintiff were to go one step farther in his declaration, and allege that, in consequence of the slander, he sustained some special damage — as that he was a merchant, and lost customers, he was a clergyman, and lost a valuable pastorate, he was engaged to a lady of fortune, and she rejected him — then the declaration would show a good cause of action, and no demurrer would lie

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27 Steph Pl. 143, 1 Chit Pl 662

In deciding whether or not a declaration is demurrable, you can look to it alone You cannot look to the writ, nor to any deed, or will, or record, or other evidence. These evidences may show that the declaration is false in its statements, but in that case you must deny it by plea, and when the issue made by the plea comes to be tried by the jury, then you are to introduce the evidence which shows the falsity of the declaration However false the declaration may be in fact, the court is bound to take it as true in deciding upon the demurrer [28]

At common law the declaration had not only to be sufficient in substance, but the facts had to be stated in due legal form. And it might be demurred to for a defect in form as well as in substance. A demurrer for a formal defect was called a *special* demurrer, because it had to specify the particular defect complained of. A demurrer for a defect in substance was a *general* demurrer, because it merely alleged in general terms that the declaration was insufficient [29]

The special demurrer, or rather the demurrer for formal defects, is now abolished,[30] but the demurrer for substantial defects must specify the objection relied on [31] So that what was a general demurrer is now to be a special one

As a consequence of this change in the law, a demurrer is no longer a "general fault-finder."(*a*) It was so at the common law, that is, it went back to the first faulty pleading by either party, thus the defendant's demurrer to the plaintiff's replication would "hit the defendant's own plea," the first fault being there; and the plaintiff's demurrer to the defendant's plea would reach a defect in the plaintiff's declaration It was a stone cast which hit the party first guilty of bad

28 Steph Pl 44, 62, 63. 29. Steph Pl 140, 141
30 § 3576, M. & V 31 § 3644, M & V.
(*a*) Hobbs *v.* M & C. R. R, 12 Heisk 526

pleading, though that should be the thrower himself.(*b*) But now, as all demurrers must state the objection relied on, by necessary implication its effect is confined to the defect in the particular pleading against which it is directed.(*c*)

Immaterial variances, errors, omissions, or defects are not *substantial defects,* and hence are not the subjects of demurrer now It has heretofore been seen that, if the declaration, by a fair and natural construction of its language, shows a substantial cause of action, that is sufficient. If the defect is so great as to prevent the declaration from showing this, then the defect is material, and the declaration is demurrable, otherwise it is not. But the defendant has a right to know, with reasonable certainty, what cause of action is declared on, and if the declaration is defective in this particular, he may, by *motion,* require the plaintiff to make his pleading more intelligible. The declaration may be prolix, irrelevant, or frivolous in its statements These are not grounds of demurrer, but the defendant may have the frivolous or other immaterial statements stricken out, upon a motion to that effect Many of the old common-law forms would be deemed prolix; and so deeply do some of them bury beneath a mass of words the simple fact which constitutes the cause of action, that they might be objected to as not conveying "a reasonable certainty of meaning." If they do not confound the lawyer, they do the jury. And certainly the statement of facts ought, as far as possible, to be made intelligible to those who are to decide whether they are true or false.

If, as above stated, the declaration stopped with the allegation "that the defendant falsely and maliciously

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(*b*) Ward *v* Moore, 6 Yerg 490, Governor *v* Porte 's Exrs, 4 Yerg 192, Lewis *v.* State, 1 Head, 330 See 1 Chit Pl 668, and authorities cited

(*c*) Hobbs *v.* M & C R R, *supra*

said of the plaintiff, 'he is a liar,'" this would present a case of defect in substance, and a demurrer would lie to the declaration, and it would be in the following form:

No. 1. Demurrer.

A. B
v
C. D.

The defendant says that the declaration is not sufficient in law, because the words which it states were falsely and maliciously spoken by the defendant, are not actionable in themselves, and it is not alleged that the plaintiff has sustained any special damage from the speaking of them

WM. L. BROWN,
Attorney for Defendant

This demurrer makes an issue of law, and it is to be argued by counsel, and decided by the court at the term at which it is filed, unless it is continued for good cause. If it is decided against the plaintiff, the demurrer is said to be *sustained,* and judgment is rendered against the plaintiff for the costs of the suit, thus:

Judgment on Demurrer.

A. B
v
C. D

Came the parties, by their attorneys, and argued the demurrer to the declaration. Whereupon it is considered by the court that the demurrer be sustained, and that the defendant go hence, and recover of the plaintiff the costs of this suit.

The sustaining of the demurrer is an end of the suit, unless the plaintiff amends his declaration. This he may do at any time, by leave of the court, either before or after a demurrer filed, and either before or after it is sustained, during the same term of the court, but when the court adjourns the suit is at an end.

The amendment is made by writing a new declaration, or by introducing into the old one a statement of the fact for the want of which it was defective.

The foregoing Demurrer No. 1 may be taken as an illustration. There the declaration stopped at the slanderous words: "He is a liar." The demurrer was sustained because these words were not actionable, unless some special damage resulted from them Now, if any special damage did result, the plaintiff may state it, by way of amendment, and the judgment on the demurrer will be set aside, and the action proceed.

Under the very liberal rules allowing amendments, the court may admit material amendments at any stage of the proceedings.[32] The Supreme Court of Tennessee have said: "It is a downright violation of principles, and of good sense, to determine any case otherwise than upon its merits, and it is a great imputation upon judges that so many statutes of *jeofails* have been needful to place common sense upon her native seat, from which she has been driven by technicalities"[33] In allowing amendments the ends of justice are kept in view, and so the amendment should be good in substance, and it should be made to appear that it is probably true The court would not allow frivolous matter, nor an untruth, to be inserted in the record by an amendment[34] There is no positive rule in Tennessee requiring amendments to be sworn to. There are, however, intimations to that effect in some of the decisions, and the whole subject is so largely in the discretion of the court that such a requirement would not be error.[35]

A demurrer lies for the want of profert of the writing

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32 § 3578 M & V. Before or after judgment on demurrer § 3645, M & V After verdict Floyd v Wood, 4 Yerg. 165 After judgment by default Fowlkes v Webber, 8 Humphr 530 But not allowed to the extent of introducing a new action Nance v Thompson, 1 Sneed, 327

33 Henderson v King, 4 Hayw 97

34 Grissom v Fite, 1 Head, 331, Overton v Crabb 4 Hayw 109 Slation v Johnson, 4 Hayw 197; Gillespie v Davis, 5 Yerg 317

35 Overton v Crabb, Henderson v King, *supra;* 4 Humphr 511; 5 Humphr 106, 7 Humphr 108, 9 Humphr 732, 4 Heisk 419.

sued on. This was only ground of special demurrer at common law. It constitutes an exception to the general rule abolishing the special demurrer. The distinction between profert and the actual production of the instrument made profert of must be kept in mind. Profert means that the pleader is ready and willing to produce the paper if the other party wishes to see it. It is a mere offer to produce, and is well pleaded by the use of the words, "here to the court shown" A declaration, therefore, containing these words is not demurrable for want of profert, though the instrument be not in fact produced or exhibited. It is the absence of these words, or their equivalent, which makes the pleading demurrable. *Failure to file or produce the instrument* of which profert is made is not a ground of demurrer.[36]

But the defendant is entitled to see the paper upon which he is sued, if it, or anything the law substitutes for it, as an affidavit or supplied copy of it, can be produced, and if he demands its production in the proper way, he is entitled to it before he will be required to plead This he does by praying oyer

Oyer is a prayer or petition by the defendant that he may hear read to him (meaning now, that he may see and read) the paper made profert of in the plaintiff's declaration, and if this privilege is denied him he should then move the court to have his prayer entered on the record, and this entry partakes of the nature of a plea. The plaintiff in reply to this plea may show that the defendant is not entitled to oyer, in which case the court would require the defendant to plead to the declaration or suffer judgment by default. But if the court should hold that the defendant is entitled to see and read the

36. Anderson v Allison & Co, 2 Head, 123; Williams v Bryan, 5 Coldw 104, Everly v Marable, 2 Yerg 113 Profert is excused when instrument lost 10 Humphr. 415, 2 Swan, 640; 7 Heisk. 628

paper, the plaintiff will not be allowed to proceed to judgment until the instrument is produced.

Such was substantially the mode of procedure at the common law.[37] Perhaps now all that would be required of the party wishing to see the paper upon which he was sued would be to show in open court that he had made a proper demand upon the adverse party, or his attorney, and that the paper had been improperly withheld. These facts being made to appear by affidavit of the party, his attorney, or agent, would justify the court in making a rule upon the opposing party to produce or show cause why the paper should not be produced, followed by an order that proceedings in the cause be stayed until the rule be complied with.

Profert of the instrument sued on does not make it a part of the declaration, though it be present in court and actually filed with the pleading. It may be a matter of importance to the defendant to have it made a part of the declaration, and this he may do by praying oyer. The plaintiff, in declaring upon a paper, need not set out more than suits his own immediate purpose, and even that part which he states may be set forth in substance only, or according to its legal purport. Now if, upon craving oyer of the instrument, and thus setting it out in full as a part of the plaintiff's declaration, there should be disclosed such a variance between the writing and the description of it in the declaration as shows the plaintiff to have no cause of action, this would, of course, be ground of demurrer. But if, notwithstanding the variance, it appears that the plaintiff has a good cause of action, there can be no demurrer.[38]

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37 1 Chit Pl 429, 432, 1 Tidd Pr 586, Anderson *v* Allison & Co, *supra*, Williams *v* Bryan, 5 Coldw 107, Mabry *v* Cowan, 6 Heisk 297

38. Haley *v* Long, Peck, 96, 1 Chit. 429, 432, 666, 1 Tidd, *supra;* McConnell *v* Read, Mart & Y 225 Defects in a declaration may be cured by oyer, as by supplying a fact which has been omitted Degrafinreid *v* Mays, 6 Yerg 466

The following is the usual mode for praying oyer:

Praying Oyer.

A. B. }
v
C D }

The defendant craves oyer of the promissory note (or, writing obligatory, or, writing) in the declaration mentioned, and it is read to him in these words: (Here set out a full copy of it), which, being read and heard, the defendant, for cause of demurrer, says (proceeding as in any other demurrer)

A demurrer will lie for want of jurisdiction in the court, thus: If an action be brought in the Circuit Court for the recovery of fifty dollars or less on a contract, the defendant may demur to the declaration. And so, if an action of a purely equitable nature be brought in a court having only common-law jurisdiction, a demurrer will lie. And, generally, in every case where the court is without jurisdiction, or the plaintiff fails to show in himself a substantial cause of action a demurrer lies. If the declaration, on its face, shows the right of action barred by the statute of limitations, the defense of the statute is in courts of law made by plea, to which the plaintiff may reply a new promise; but, on principle, there would seem to be no reason why it could not equally be made by demurrer. The replication of the plaintiff, in avoidance of the plea, is the allegation of a new fact not set forth in his declaration, which may as well be inserted in the declaration by amendment in avoidance of the demurrer.

The party against whom a judgment on demurrer is rendered, may plead over as a matter of right, and without asking leave of the court to do so. The judgment is *respondeat ouster*, that he answer over, or plead, thus:

Judgment Respondeat Ouster.

A B }
r
C D }

Came the parties, by their attorneys, and argued the demurrer to the declaration. Whereupon, it is ordered that the demurrer be overruled, that the defendant plead over to the declaration, and that he pay the costs of the demurrer

If the original time allowed the defendant for pleading to the declaration has not expired at the time of overruling the demurrer, then, in the absence of an order of the court allowing further time, he must plead within that time. But the court may fix a more distant day of the term, or upon good cause shown may grant time until the next term, within which the party is to plead. If he does not plead within the time allowed, a writ of inquiry, if that be necessary, will be awarded immediately, and, if that be not necessary, then judgment final without a jury, will be rendered against him. A writ of inquiry is needful only in cases where the amount which the plaintiff should recover is not ascertainable from the papers in the cause, as where he is suing for an assault and battery, or for slander, or the like, and the damages claimed are *unliquidated*, that is, unascertained, not fixed by agreement of the parties

A writ of inquiry is an order to the sheriff to bring a jury into court to assess the damages sustained by the plaintiff on account of the facts stated in the declaration No writ actually issues, but the sheriff is simply ordered, as in other cases, to bring in a jury. The name, writ of inquiry, is given to the *proceeding*, being borrowed from the English books The judgment for a writ of inquiry is *interlocutory*, and runs thus

Form of Judgment for Writ of Inquiry.

A B }
" }
C D }

The defendant having failed to plead to the declaration, it is, on motion of the plaintiff, considered by the court that he recover of the defendant his damages, to be assessed by a jury at the present term

When the jury come, the following oath is administered to them:

You solemnly swear that you will well and truly assess the damages in the case of A B. *v.* C. D.

The jury being sworn, the plaintiff then presents his proof relating alone to the *amount* of damages which he should recover. The question of *right* in the plaintiff is not to be considered by the jury, but the *extent* or *amount* of damage suffered by him on the facts presented to them. The case is submitted to them for the determination of this question alone, under instructions from the court Upon the return of their verdict, the court pronounces a final judgment, which may be in the following form.

Form of Final Judgment.

A B
v.
C D.

Came the plaintiff (or, the parties, if the defendant is present), and also a jury of good and lawful men, viz A, B, C. etc, who, being sworn well and truly to assess the plaintiff's damages for the breach of covenant (the slander, the assault and battery, or whatever else the declaration may complain of, or, it may be more generally, "on account of the premises") alleged in his declaration, upon their oath do say, they assess his damages to five hundred dollars Therefore, it is considered by the court that the plaintiff recover of the defendant the sum of five hundred dollars damages, and also the costs of suit.

If the amount of the plaintiff's demand can be ascertained by simple calculation from the papers, then the judgment of the court is final without jury. There can be no use for a jury to ascertain what can be made certain by simple calculation upon a note or other writing showing on the face of it so much money due at a certain time. The form of judgment in this case is as follows:

Form of Judgment Final on Overruling Demurrer.

A B
v
C D

Came the plaintiff, and on his motion the defendant having failed to plead to the declaration, it is considered by the court that the plaintiff recover of him five hundred dollars, the principal due by the note sued on, and one hundred dollars interest thereon, and also the costs of suit.

CHAPTER VI.

GENERAL ISSUE.

§ 1. In the last chapter the defenses treated of are *preliminary* and *dilatory* in character, none of them necessarily involving an absolute determination of the rights of the parties. If the defendant does not choose to resort to either of the three modes, there pointed out, for making his defense, or, having done so, has failed of success, there remains for him still one other resort, and that is a plea in bar of the action.

This is an answer to the facts stated in the declaration; neither the plea in abatement, nor the demurrer, is an answer to those facts, but it is the object of each to show that the defendant is not bound to answer them at all.

The plea in bar is called a *peremptory* plea, because it is a positive answer to the declaration, and its effect is to be an absolute end of the controversy. It is called a plea to the *merits*, because it waives all irregularities and informalities, and puts the contest upon the merits of the case

Pleas in bar are of two kinds. *First*—A broad *traverse* or *denial* of the allegations contained in the declaration, denominated *the general issue*,(*a*) which is so called because the issue which it tenders is usually of a more general or comprehensive kind than that tendered by any other plea. *Second*—Special plea, by which is meant a plea in which is stated the particular ground of defense relied upon. It may be a specific denial of some particular fact

(*a*) See Steph Pl 153 *et seq*, where various kinds of *traverses* are mentioned The distinctions there made are not now considered of sufficient practical benefit to justify a discussion of them in this volume All traverses not amounting to the general issue are treated in the succeeding chapter as special pleas

or facts essential to sustain the plaintiff's cause of action. or it may be a plea of *confession and avoidance,* that is, it may confess what is alleged in the declaration, but avoid the legal effect of that confession by setting up new matter, which shows that the plaintiff is not entitled to a judgment.

Take, for example, the declaration for an assault and battery. The defendant may either deny that he assaulted and beat the plaintiff, which would be a *traverse,* or he may admit that he did assault and beat him, but allege that the plaintiff first assaulted him, and that his assault on the plaintiff was in self-defense. This would be a plea of confession and avoidance So to the declaration on a marriage contract; the defendant might deny the contract, or he might plead that he was an infant when he entered into it. This infancy is a new fact, not appearing in the pleadings before, and it is an effectual bar to the action, if true Such a plea may not, and generally does not expressly confess what the declaration alleges; but it is always an implied confession It is a rule of the law of pleading that whatever is not denied is confessed As this plea denies nothing it confesses everything, and turns the lawsuit upon the truth of the new matter pleaded.

§ 2. In the further discussion of these two kinds of pleas in bar, the *general issue* will be first noticed

In the common-law system of pleading there were *forms* of action, and every injury a man complained of might be and had to be sued for in one of those forms. The declaration always showed in its commencement in what form of action he sued, and then went on to state the facts, and those facts were stated in a formal manner To each of these forms there was a form of plea which amounted to a denial of the whole cause of action, and in most cases put in issue every essential fact stated in the declaration, so that the plaintiff was bound to prove every one of them, or fail. These pleas were called general issues.

Only four of them have been in common use in this country, namely. *Not guilty, non detinet, nil debet,* and *non assumpsit.* The first two applied to all actions on tort; the last two to all actions of debt and *assumpsit,* which are now the only actions founded on contract Covenant was formerly the action brought on a contract *under seal* to recover damages for the breach of it. The contract and the breach were the two facts alleged. There was no form of plea by which both these facts could be denied. The contract had to be denied by a special plea, called *non est factum — it is not his deed.* This by itself admitted the breaches, so that there had to be another special plea to deny them. *Non est factum* was sometimes called a general issue; but in the strict sense it cannot now be so regarded.

Private seals have long since been abolished in this country, and with them necessarily the action of covenant disappeared What would have been an action of covenant at the common law, would now be neither more nor less than an action of *assumpsit,* to which the general issue of *non assumpsit* would apply

As to the general issue *non detinet* there seems to be no reason why it should be retained, at least such is the case in Tennessee. The Code of that State provides that the defendant may enter a general denial of the plaintiff's cause of action *equivalent to the general issue*[1] *Non detinet* was the general issue to an action of detinue. *Not guilty* would certainly be its equivalent The declaration in detinue charges a tort in wrongfully detaining from the plaintiff his property. The general law of the land secures to the citizen certain rights of property and person, and the violation of the rights thus secured is called a tort, that is, a wrong, an act of guilt; and to such a charge the most direct response from the defendant would be "not guilty."

1. § 3623, M. & V.

Such a plea would now be a good general issue in detinue, whether it would have been good heretofore or not [2]

It follows then that there are but three forms of the general issue in practical use, *not guilty, nil debet,* and *non assumpsit.* Not guilty applies in every action that can now be brought for a tort; *nil debet* or its equivalent in every action upon a contract for the recovery of money wherever the demand is for a sum certain or capable of being reduced to a certainty, and *non assumpsit* or its equivalent in every action brought for the recovery of damages for the breach of a contract.

§ 3. In pleading the general issue it is not proper to say simply *not guilty, nil debet,* or *non assumpsit.* These words are not pleas, but only the names of pleas They may be accepted as pleas by the plaintiff, and then the court may treat them as such, but the plaintiff or the court on its own motion may disregard them, and judgment may be taken for the want of a plea.[3] They should be drawn out in full, thus

No. 1. Not Guilty.

A B
v
C D

The defendant for plea says he is not guilty of the matters in the plaintiff's declaration alleged

E. F,
Attorney

No. 2. Nil Debet.

A B
v
C D

The defendant for plea says he does not owe the plaintiff as he has alleged in his declaration.

E F,
Attorney.

No. 3. Non Assumpsit.

A B
v
C D

The defendant for plea says he did not promise as the plaintiff has in his declaration alleged

E F,
Attorney

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2 § 3624, M & V

3. Corn *v* Brazelton, 2 Swan 274, Grant *v* Jennings, 1 Coldw. 54; Boon *v* Bank, 3 Humphr 85, Boyers *v.* Pratt, 1 Humphr 91.

Verbal changes in the general issues, *nil debet* and *non assumpsit,* should be made so as to meet responsively the allegations of the declaration, thus: If the declaration in debt should say "there is due from the defendant," etc, the plea should then say, "there is nothing due," etc. And in *assumpsit,* if the allegation is that the defendant "undertook" or "agreed" or "covenanted," the plea should say the defendant did not "undertake" or "agree" or "covenant," etc. And so in any case the defendant may adapt his plea to the language of the declaration, and if it be a broad denial of the plaintiff's cause of action, it is equivalent to the general issue, and therefore good as such.

§ 4. One effect of pleading the general issue is that it puts an end to pleading. At common law all pleas had a formal conclusion. In pleas of traverse or denial this formula was called a tender of issue If the denial came from the defendant the formula was, "and of this he puts himself upon the country;" if from the plaintiff it was, "and this he prays may be inquired of by the country." The issue thus tendered was to be accepted by another formula called a *similiter,* thus: "And the plaintiff (or defendant) doth the like"

The words "upon the country" or "by the country" (*per patriam*) mean by the jury. This was the form used by the ancient pleader in demanding a jury trial. As the State Constitutions without exception guarantee to the parties their common-law right of trial by jury, this formula would seem to be useless, and it has been abandoned in pleading. But in all the States statutes have been enacted regulating the exercise of this right, so that in all of them the party must in some way make known his desire for a jury, or the right to it is considered waived. In Tennessee the statute requires the party desiring a jury to ask for the same in the first pleading

tendering an issue triable by a jury, or by having an entry made on the trial docket to that effect on the first day of any term at which the case stands for trial, and unless such demand is made in the manner required, it shall be the duty of the court to try the case without a jury. The reader is referred to the chapter on Trial for a further discussion of this statute.

When the parties have reached an issue, pleading is at an end, and this occurs when the affirmative allegations of the declaration are met and denied by the use of the general issue or its equivalent.

The court can try nothing but the issue raised by the pleadings, and no evidence can be heard on the trial, except such as relates to or reflects upon the issue thus presented. The general issue does not in all cases open the door to all defenses. It is in some actions quite comprehensive, but in others it is restricted to a single fact. The *scope* of the general issue, and what may be proved under it, should be well understood by the pleader. A blind reliance on it alone may in some cases prove fatal to the defendant by cutting him off from the only true and real defense that he has to the plaintiff's action. A brief statement of the law on this subject will be useful to the student

§ 5. Actions founded on tort arise out of injuries done the person, the character, or property of another, and the wrongful act is in the law of pleading, *trespass,* or *trespass on the case.* The effect of the general issue in such cases, which is "not guilty," varies according to the nature of the wrong complained of. In an action of trespass affecting the person, as assault and battery, the general issue amounts to a mere denial of the wrongful act, and admits of no evidence of facts in justification. If as a matter of fact the defendant did *not* assault and beat the plaintiff, then the general issue would be the

proper plea; but if he *did* commit the assault and battery, and the real defense is that it was done in necessary self-defense, or under other circumstances of justification, then the general issue would be inapplicable, for none of these facts can be shown under it.[4] The defendant in such case should abandon the general issue and present his defense by special plea

§ 6. In an action of trespass affecting property, real or personal, the plea not guilty puts in issue two facts, the alleged wrongful act, and the title of the plaintiff, and under it the defendant may show in the evidence, that he did not commit the act complained of, or if he did, that the plaintiff has no title or interest in the property upon which to found his action for the injury. The *lawful possession* of the property by the plaintiff is usually all the interest required to support the action The defendant may under the general issue show title or right to possession in himself or in another under whom he claims, for that would disprove property or right to the possession in the plaintiff If the defense is to be rested upon any other than the two facts above stated, that is, the denial of the act, and of the plaintiff's title or interest in the property, the general issue will not apply, but the defendant must resort to a special plea.[5]

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4. Steph Pl 162, note 20, 1 Chit Pl 501 The *intention to do harm* is of the essence of an assault The *quo animo* is material, for if there is no unlawful intention there is no assault, and so as to the battery, the plaintiff must come prepared to show the *intention* unlawful or the defendant *in fault* For if there be no *unlawful intention*, and the defendant be *entirely* free from blame, he will not be liable Evidence, therefore, on these points is admissible under the general issue *in disproof of the charge.* 2 Greenl Ev, § 94, Smith v Brazelton, 1 Heisk 52

5 Steph Pl 162, note 20, 1 Chit Pl 501, 502, 505, 10 Wend 112, 11 Johns 132, Peck v Gross, 6 Heisk 109, 2 Greenl Ev, § 625, 58 Am Dec 374

The case of Carson v Prater, 6 Coldw 567, says "In an action of trespass *de bonis asportatis*, the plea of not guilty does not put in issue the title of the plaintiff, but amounts only to a denial of having committed the trespass alleged" The only authority cited for

§ 7. In ejectment the general issue not guilty is exceedingly comprehensive. In the Code of Tennessee it is provided that the defendant may plead that he is not guilty of unlawfully withholding the premises claimed by the plaintiff, and upon such plea may avail himself of *all* legal defenses.[6] Under this plea the defendant may set up any defense, whether it be title in himself, or some third person, the statute of limitations, former adjudication, arbitration, compromise, or anything else which is sufficient to bar the recovery But he is not allowed to prove the very thing which he *in terms* pleads, that is, that he is not withholding the possession, for by legal construction not guilty admits that the defendant is in possession of the premises;[7] so that the legal effect of the general issue in this case is to admit what is denied, which is contrary to the general principle that pleading, like other writings, shall be understood to assert or deny only what their language imports. It follows, if the defendant is not in fact withholding the land described in the declaration, nor claiming an interest in it, nor exercising acts of ownership over it, that the general issue would not apply, for the defendant can only present such a defense under a special plea of disclaimer. But if he is in fact withholding *part* of the land claimed by the plaintiff, then the plea of not guilty, qualified by a disclaimer as to the land not with-

this conclusion is 1 Chit Pl 519, which does directly support the view of the court But the court overlooked the fact that the author was stating the law of England under the recent rules (Hil T 4 Wm IV), which is not common law with us, and has not been re enacted here The author correctly states the law in force in this country, at the pages of his work, cited *supra* Carson *v* Prater therefore, on this point is not law See American editor's preface to ninth edition, Chitty, also Plowman *v* Foster, 6 Coldw 53

6. § 3963, M & V, Jones *v* Brooks, 6 Heisk 157

7. § 3964, M & V In an action of ejectment *title* only is involved and not the *right of possession* A denial of possession therefore would be a bad plea, because it would raise an immaterial issue The law makes the plea not guilty mean a denial of the matter involved, the plaintiff's title, and so good.

held, would be appropriate.[8] The following form for such a plea is suggested:

A B
v
C D

No. 4. Not Guilty and Disclaimer.

The defendant for plea says he is not guilty of unlawfully withholding from the plaintiff that part of the land described in the declaration which is included in the following boundaries, to wit (Here insert the boundaries of the land claimed by the defendant) And the defendant disclaims all right and title to that part of the land described in the plaintiff's declaration which is not included in said boundaries, and says he is not in possession of, nor claiming, nor in any manner exercising, acts of ownership over the same

E F,
Attorney

If the defendant disclaims as to all or any part of the land sued for, the burden is on the plaintiff to show the defendant's possession or claim of ownership The Code of Tennessee allows an action of ejectment against any person *claiming an interest* in the land, although not an actual occupant[9] Adopting the language of the Tennessee Code, the general issue in ejectment without disclaimer would be as follows·

A B
v
C D

No. 5. Not Guilty.

The defendant for plea says he is not guilty of unlawfully withholding the premises claimed by the plaintiff in his declaration

E. F,
Attorney.

§ 8. In the action of replevin, *non cepit,* the general issue at the common law amounted only to a denial of the taking, and therefore admitted the title of the plaintiff, upon the principle that what is not denied in pleading

8 Lea *v* Slatterly, 7 Baxt 236, Jones *v* Brooks, 6 Heisk 157
9 § 3955, M & V, Lea *v* Slatterly, *supra;* Langford *v* Love, 3 Sneed, 309, Smith *v* Lee, 1 Coldw. 549.

is admitted. But the general issue is now "*not guilty,*" which puts in issue not only the taking, but the plaintiff's title, and, it would seem, everything else, for under it *all matters of defense* may be shown in the evidence without resort to special plea [10]

§ 9. In the action of trover which is brought to recover the value of personal chattels wrongfully converted by another to his own use, the general issue "not guilty," puts the whole declaration in issue, and under it all matters of defense may be given in evidence, except a release and the statute of limitations.[11]

§ 10. The action of detinue, like replevin, is brought for the recovery of specific articles, the distinction being that in replevin the plaintiff obtains possession of the chattel sued for at the commencement of his action, and before judgment, while in detinue he obtains possession after judgment, and under final process The general issue at common law, *non detinet,* put in issue the *detention* and the *plaintiff's title,* and the evidence was confined to these two points [12]

But the Supreme Court of Tennessee have held that the statute of limitations is included in the general issue, and need not be specially pleaded.[13] It has been shown that "*not guilty*" is the equivalent of *non detinet,* and hence, that the general issue Form No. 1, is appropriate in this action. There would seem to be no reason why "not guilty" in detinue should not have the same effect as the like plea in replevin, that is, admit all defenses without resort to special pleas. The cause of action is

10. § 4124, M & V., McFerren *v* Perry, 1 Sneed, 315, Parham *v.* Riley, 4 Coldw. 6

11 2 Greenl Ev, § 648; Pemberton *v* Smith, 3 Head, 18, 1 Chit Pl 498. See Crenshaw *v.* Smith, 10 Heisk 2, which decides, directly in conflict with Pemberton *v.* Smith, *supra,* but without noticing that case, that the defendant cannot *justify* the conversion under the general issue, as that the seizure and sale was under process.

12 1 Chit Pl 489

13. Morrow *v.* Hatfield, 6 Humphr 108

the same, the same thing is sought to be accomplished, and the only difference in the allegations of the declaration lies in the *tense* of the words used in charging the wrong, which would hardly justify any variation in the two actions as to the admissibility of evidence under the general issue.[14]

§ 11. The distinction between trespass and trespass on the case has heretofore been shown. If the wrong complained of is such that at the common law the form of action must have been trespass on the case, then libel and slander being excepted, the general issue, not guilty, not only denies the wrongful acts complained of, but admits evidence of justification or excuse, and also any matter of discharge, such as arbitrament, compromise, former adjudication, accord and satisfaction, release, and indeed anything that will defeat the action, *except the statute of limitations.* It is said in these actions the plaintiff must proceed on the justice and conscience of his case, and therefore whatever would in equity and good conscience preclude the plaintiff from recovering, may be given in evidence by the defendant under the general issue, the statute of limitations, which must be specially pleaded, constituting the only exception.[15]

But in actions on the case for wrongs affecting the character, as libel and slander, the general issue not guilty is much more restricted in its scope It puts in issue only the malicious uttering or publishing of the words. The defendant, under such a plea, cannot introduce evidence tending to establish the truth of the words, but he may give in evidence any matter tending to deny or disprove any material allegation of the declaration, such as the

14. Ejectment, replevin, detinue, and trover are all actions in form *ex delicto*, and, having in them an element of *force*, are each of the nature of *trespass vi et armis*, as distinguished from trespass on the case 1 Chit Pl 121, 376

15 Plowman *v* Foster, 6 Coldw. 54, 1 Chit Pl 491, 498, 2 Greenl. Ev, §§ 231, 232

speaking or publishing of the words, the malicious intention, or the injurious consequences resulting from the act complained of. The tendency of recent adjudications is to give much wider latitude in the introduction of evidence in mitigation of damages under the general issue than formerly. If the defendant spoke the words in anger, or was misled by the conduct of the plaintiff, he may give such facts in evidence in mitigation of damages. But if his defense is that the words spoken or published are true, then he should plead specially "*justification,*" which admits the speaking or publishing, and relies upon the truth of the words to defeat the plaintiff's action.[16] The statute of limitations must be specially pleaded,[17] and so, it would seem, should all matters in bar or discharge arising since the act complained of, such as accord and satisfaction, arbitrament, compromise, release, and the like, but Mr. Greenleaf states the law differently, saying these matters may be relied on under the general issue,[18] and in Tennessee it is held the insanity of the defendant at the time of speaking the words may be shown under the general issue *as a good defense* to the action.[19]

§ 12. In actions of debt and *assumpsit,* which are actions on contracts, express or implied, written or unwritten, the general issues, *nil debet* and *non assumpsit,* admit almost every defense, whether by way of denial or avoidance. The plea in neither case puts in issue the *execution* of the written contract, which constitutes the foundation of the action. This can only be done by the special plea *non est factum.* And so bankruptcy of the defendant, set-off, tender, and the statute of limitations,

16. 2 Greenl Ev, § 421 *et seq* Shirly *v* Keathy, 4 Coldw 29; Haws *v* Sandford, 4 Sneed, 520, West *v* Walker, 2 Swan, 33, Hill *v* Goodyear, 4 Lea, 237, Hackett *v* Brown, 2 Heisk. 273.

17. 1 Chit Pl 496

18. 2 Greenl Ev, § 422

19 Bryant *v* Jackson, 6 Humphr 200.

must be specially pleaded.[20] And although the law seems to be somewhat in doubt elsewhere, it is settled in Tennessee that matters of defense arising out of the contract sued on, and which would constitute the foundation of a cross-action in *recoupment* or reduction of the plaintiff's demand, as the failure of consideration, must be specially pleaded, and upon the same principle usury should be specially pleaded, which by force of the statute would seem to be necessary in Tennessee.[21] But under the general issue in either action, debt, or *assumpsit*, the defendant may give in evidence any matter showing that the plaintiff *never had* any cause of action, such as the defendant's infancy, lunacy, drunkenness, or other mental incapacity, coverture at the time of contracting, duress or that the contract was void, or that performance on his part has been prevented by the act of the plaintiff, or of the law, or by the act of God, and the like. He may also give in evidence any matters in *discharge* of his liability, as payment, accord and satisfaction, former recovery, discharge by a new contract, release, that the plaintiff has no beneficial interest in the contract sued on, and the like.[22]

§ 13. While it is true that the defendant may in some cases, in relying alone on the general issue, be cut off from his real defense, which he should have pleaded specially, it is also true that the general issue leaves the plaintiff in many cases in total darkness as to what will be the particular ground of defense under it. As in the case of *nil debet*, there are some defenses which are not included in it, and the plaintiff knows the defendant cannot rely upon them, but there are a great many defenses distinct in their character, upon which the defendant may rely, but which particular one the defendant will rest his

20. 2 Greenl. Ev., §§ 135, 282, 1 Chit. Pl. 481.

21. Simpson *v.* Moore, 6 Baxt. 373, Hogg *v.* Cardwell, 4 Sneed, 155; 2 Greenl. Ev. § 136; Cheek *v.* Bank, 10 Heisk. 618; Stephenson *v.* Landis, 14 Lea, 423, § 2707 *et seq.*, M. & V.

22. 2 Greenl. Ev., §§ 135, 281*a*; Eaken *v.* Burger, 1 Sneed, 419, 1 Chit. Pl. 476–478, 481.

case on in the proof the plaintiff has no means of knowing from an inspection of the pleading It may be payment, release, accord and satisfaction, infancy, duress, or something else, but what *will* it be, and what must the plaintiff arrange to meet in his proof. Plainly the use of the general issue alone may expose the plaintiff to all the dangers of surprise, and yet the dangers are not so great as they would seem to be on first impression The parties usually know the points of real contest between them, and are not often entrapped by the deceitful language of the general issue.

To avoid the danger of surprise, whatever it may be, in some of the States, the law requires that the general issues shall be pleaded *with notice* of the special defenses to be relied on, and the defendant is not allowed to rely on anything of which such notice is not given In Tennessee the rule is both ways, that is, the defendant may plead the general issue *with* or *without* notice of special defenses, as he chooses, and the result is the bar has adopted the practice generally of pleading *without* notice The notice consists of a statement of the particular defenses, which the defendant expects to rely upon It is not confined to those defenses that would have been included in the particular general issue without notice, but it may designate all, or any number of them, and also any other ground of defense not included in it which the defendant could specially plead The several defenses must be stated separately in the notice; they must have each all the requisites of good special pleas, which in effect they are; they require no replication from the plaintiff, and need not be demurred to for insufficiency, but may on motion be stricken out Such, generally, is the substance of the decisions in Tennessee on the subject of pleading the general issue with notice [23] The notice of special defenses

23 West v Tyler, 2 Coldw 100 Hart v Reynolds, 1 Heisk 214; Brady v. Wasson, 6 Heisk 131, Railroad v Cook, 11 Heisk 576

is given by writing them on the same or a connected sheet of paper, with and immediately after the general issue, and the whole is filed, as other pleadings, as the defendant's plea to the declaration. No other *notice* to the plaintiff is required. In illustration of the form of pleading the general issue with notice of special defenses, the following is submitted as the defendant's plea to the declaration for a breach of marriage promise, to wit:

No 6. General Issue with Notice.

A B
v.
C D

The defendant, for plea, says he did not contract with the plaintiff, as she has alleged in her declaration E F,
Attorney

And the defendant gives notice that he will, on the trial of the cause, rely upon the following defenses, to wit
First. That he never entered into any contract with the plaintiff to marry her
Second That if he did, he was at the time under twenty one years of age
Third That if he did make the contract, the plaintiff's action on it accrued more than six years before suit was brought
E F,
Attorney for Defendant.

§ 14 The general statements of this chapter on the subject of the general issue in actions upon contracts do not apply to actions upon judgments It is a long-established rule that the judgment of a court of competent jurisdiction upon a question directly involved in the suit, is *conclusive* between the parties and their privies, and the question thus finally determined can never again be the subject-matter of another suit between the same parties or their privies And this being so, it is said the general issue *nil debet* to an action upon a judgment is a bad plea. This rule applies not only to domestic judgments, but to judgments rendered in another State, for the reason that the Constitution of the United States and the laws of

Congress give to judicial proceedings the same force and effect in every other State that they have in the State where the proceedings were had. To an action upon a judgment, defense may be made by pleading *nul tiel record* or some other special plea, as payment, accord and satisfaction, statute of limitations, bankruptcy of the defendant, and the like, but no matter of defense can be pleaded which existed anterior to the recovery of the judgment, all such defenses being precluded by the judgment.[24]

24 Ridley *v* Buchanan, 2 Swan, 558 Armstrong *v* Carson, 2 Dall 302. Mills *v* Duryee, 7 Cranch, 481, 1 Kent Comm 261, 1 Chit. Pl. 485.

CHAPTER VII.

SPECIAL PLEAS, REPLICATIONS, AND OTHER PLEADINGS.

§ 1. Pleas of *confession and avoidance* were alone regarded as *special pleas* at the common law. All other pleas were called pleas of *traverse,* of which there were various kinds. The common-law classification of pleas is not pursued in this volume. The changes in the law of most of the States justifies the more natural division of the subject into two general heads:

1. The general issue, discussed in the last chapter.

2 Special pleas, in which are included all pleas not amounting to the general issue, whether they be pleas of denial or of confession and avoidance

It is proposed in this chapter to treat of special pleas by the defendant in answer to the plaintiff's declaration, and of all subsequent pleadings by the parties respectively until an issue is reached. After the defendant's *Plea* to the declaration comes the plaintiff's *Replication,* followed by the defendant's *Rejoinder,* and that by the plaintiff's *Sur-Rejoinder,* and that by the defendant's *Rebutter,* and that by the plaintiff's *Sur-Rebutter* This is as far as pleadings have been named, but it is not necessarily the end of pleading, for the law requires a continuance of the judicial altercation until an *issue* is reached, and that does not occur until a fact is affirmed by one party and denied by the other. The replication is usually as far as pleadings proceed, but it is because the plaintiff accepts at that point the issue tendered by the defendant's plea, and does not, by the allegation of new matter, seek to avoid it. If the plaintiff, instead of joining issue upon the defendant's plea, should set up a new fact to avoid the effect of the fact stated in the plea, this would, neces-

sarily, require the use of a rejoinder on the part of the defendant, and so with the rejoinder if it does not join issue on the fact stated in the plaintiff's replication, but alleges new matter in avoidance, further pleading would be necessary on the part of the plaintiff by the use of the sur-rejoinder, and so on to the end, that is, until one party alleges a fact which the other does not avoid, but denies, and thus forms an issue.

§ 2. To illustrate the necessity for the use of the replication and pleadings subsequent thereto, let it be supposed that the declaration is upon a promissory note. Now, if the defendant's plea to such a declaration assumes the form of the general issue, that would be the end of the pleading, and no replication from the plaintiff would be necessary But if the defendant resorts to a special plea of confession and avoidance, a different result follows. Thus: the statute of limitations bars the plaintiff's remedy on the note in six years from its maturity Such a defense requires a special plea, which would be of the following form:

A B
v.
C D

No. 1. Statute Limitations.

The defendant for plea says the plaintiff's action accrued more than six years before suit brought

G H,
Attorney for Defendant

This is an exceedingly brief, but a clear and intelligible statement of an important fact. It is not a denial of anything in the declaration, but is the statement of a *new fact,* which, if true, avoids the effect of the allegations contained in the declaration Whenever the plaintiff has a *right* to sue the defendant, the *action has accrued.* The right to sue on a contract arises when the contract is broken; and it is broken in the case of a contract to pay money, so soon as the day of payment has passed without the performance of that duty. The statute of limitations,

that is, the law which limits the period within which suits may be brought, begins to run against the plaintiff at the time the action accrues, unless he is under some legal disability constituting an exception to the rule; and if he fails to sue within the period of that limitation, the plea of the statute is a good defense.[1]

The new fact stated in the foregoing plea is that the plaintiff's action accrued more than six years before he brought suit, and the legal deduction, which need not be stated in the plea, is that the plaintiff's action is barred, that is, he has by his delay lost his right to sue

This plea, it is seen, does not make an issue. It is only the affirmative statement of a fact, and not a denial of anything in the declaration. Under the rule that what is not denied in pleading is admitted, it is in its legal effect a confession of every material allegation in the declaration, and the assertion of a new fact in avoidance

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1. The statute of limitations does not annul the contract it is the *remedy* and not the cause of action which is barred, and hence the right to sue may be revived by an unqualified acknowledgment of the debt or a new promise to pay it Hunter *v* Starkes 8 Humphr 656, Butler *v* Winters, 2 Swan, 92, Woodie *v* Towle, 1 Tenn Leg Rep 331. Buchman *v* Roller, 1 Tenn Leg Rep 336 And so, although the remedy on the note be lost, the holder may foreclose a mortgage executed to secure its payment. 3 Pars Cont 99, and authority cited So where vendor takes the purchaser's notes and conveys land by deed, reserving on the face of it a lien for the payment of the purchase notes, the lien survives and is enforceable in equity, though the right of action on the notes be barred Gudger *v* Barnes, 4 Heisk 580, White *v* Blakemore, 8 Lea, 60, Wood *v* Neely, 7 Baxt. 586, Harris *v.* Vaughan, 2 Tenn Ch 483 And so, as the statute relates only to the remedy, it is enforced only as the law of the *forum*. Ester *v* Kyle, Meigs, 34 Ridge *v* Cowley, 6 Lea, 166 But see statutory exception to this rule, § 3480, M & V Legislative changes in the statute of limitations, though affecting existing contracts, do not impair the *obligation* thereof, and are constitutional 3 Pars Cont 557, and cases cited But a substantial remedy must be left to the party 3 Pars Cont 557, and cases cited Nor can the legislature destroy a vested right of defense, as by extending the limitation, and thus reviving a right of action already barred Girdner *v* Stephens, 1 Heisk 280, Henderson *v.* Felker, 1 Heisk. 274, Yancy *v* Yancy, 5 Heisk 353.

thereof. It is therefore necessary that the plaintiff should put in his replication to it. If he does not admit, but wishes to deny the truth of the fact set out in the plea, than he is said to *join issue* on the defendant's plea. Such a replication would be in the following form:

No. 2. Replication: Issue.

For replication the plaintiff joins issue on the defendant's plea [2]

E F,
Attorney for Plaintiff

Here, then, is an issue, the affirmation of a fact by one party and the denial of it by the other, which puts an end to pleading "Joining issue" upon a fact is in law equivalent to a denial of it.

The replication is usually written upon the same sheet of paper, and immediately after the plea, and so frequently the plea and all subsequent pleadings are thus connected each with the antecedent pleading; and when such is the case it is not necessary that they should have the usual caption or marginal statement of the names of the parties. But if a plea is written upon a separate sheet of paper, the marginal statement of the names of the parties would be necessary to show the connection between the plea and the one which it answers

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2 This form is, not *in terms*, but in legal effect, a broad denial of the facts set up in the plea, and is called a *general replication*, to distinguish it from a *special replication*, which, like a special plea, contains a specific statement of the fact or ground relied on §§ 3640, 3641, M & V Under the general replication to the plea of the statute of limitations it is held in Tennessee that the plaintiff may show an acknowledgment of the debt or a new promise within the six years, and thus overturn the plea. Hunter *v* Starkes, 8 Humphr 658 But as the new promise is so universally replied, it is doubtless the better practice to plead it, to avoid surprise to the other party In the case cited the replication was "the cause of action did accrue within," etc., and this was held a general replication, and under it evidence tending to show the new promise was allowed

For the sake of brevity the names of parties and attorneys will be omitted from subsequent forms in this chapter.

§ 3. But, returning to the illustration, the plaintiff may be unwilling to risk his case upon an issue formed on the defendant's plea of the statute, and so he may avoid the effect of the fact pleaded by the statement of a *new* fact not before appearing, thus:

No. 3. Replication: Infancy of Plaintiff.

The plaintiff, for replication, says he was a minor at the time his action accrued, and that he brought this suit within three years after he was twenty-one years old

The law presumes that all parties to a contract are *sui juris*, that is, that they are capable of contracting, and are not subject to any disability. A woman is presumed to be unmarried, a man to be twenty-one years old, and both to be of sound mind [3] It is a mere presumption, however, which gives way when the fact is shown to be otherwise. Simply pleading the disability does not rebut the presumption. The burden is on the pleader to show in the proof the fact to be as pleaded. (*a*)

Persons under the age of twenty-one years, persons of unsound mind, and married women, are considered as being under legal disabilities. And as against the rights of such persons, the statute of limitations does not run during the existence of such disability. In Tennessee, it is provided that they may bring their actions for the assertion or protection of rights at any time within three years after the removal of the disability [4]

In the above replication, the plaintiff assails the presumption of law by asserting that he was *not sui juris* at the time his action accrued, which is a *new* fact not be-

3. 1 Pars Cont 293, 2 Greenl. Ev., § 373
(*a*) 2 Greenl Ev, § 362. 4. § 3451, M & V.

fore appearing, and then proceeds to say that he brought his suit within the three years allowed him after his majority, which, perhaps, would have been an unnecessary statement, had he in the first instance given the exact date when he reached his majority.

This replication confesses the truth of the plea, that is, it admits that the plaintiff's action accrued more than six years before suit brought; but to avoid this, alleges the new fact of his minority until within three years before suit, which is a sufficient legal excuse for not bringing it sooner

This replication, being in avoidance, does not make an issue. The defendant must put in his rejoinder There would seem to be no way to *avoid* the fact stated in the replication, and, if this be true, the defendant is driven to the necessity of joining issue upon the replication, and this he would do by the use of either of the following forms of rejoinder.

No. 4. Rejoinder: Issue.

The defendant, for rejoinder, says the plaintiff did not bring his suit within three years after he reached the age of twenty one years

Or

No. 5. Rejoinder: Issue.

The defendant, for rejoinder, says the plaintiff was not a minor under the age of twenty-one years when his action accrued

Or:

No. 6 Rejoinder: Issue.

The defendant joins issue on the plaintiff's replication.

In Form No 4, the allegation in the plaintiff's replication of his minority at the time his action accrued is not denied, and is therefore admitted; but the admission is immaterial, for the reason that, if the plaintiff did not sue within three years after his minority ended, it

could be a matter of no consequence that he was a minor at the time his action accrued. So a denial of the fact that he brought suit within the three years is sufficient In Form No. 5, the denial, *in terms,* is only of the minority of the plaintiff at the time his action accrued; but, taken in connection with the pleading which it answers, it is necessarily a denial of the further allegation that the suit was brought within three years after the plaintiff's majority. The plaintiff, in his replication, by pleading therein his minority, admits the truth of the defendant's plea, which alleges that the action accrued more than six years before suit brought, and relies upon his minority only as an *excuse* for not suing within that period Now, the defendant's denial of the plaintiff's minority at the time his action accrued, taken in connection with the plaintiff's admission that the six years had elapsed before suit brought, amounts equally to a denial that suit was commenced within three years after majority. The assertion of an *independent* fact may be followed by the assertion of another directly *dependent* upon the first The express denial of the first would, upon principles of common sense, be deemed also a denial of the latter

Form No 6 is a general rejoinder, and it puts in issue the whole replication, that is, it denies both the fact of minority, and that suit was brought within three years after the plaintiff's majority.

§ 4. It was a common-law rule that all pleas which did not *tender an issue* had to *conclude with a verification.* Pleas, whether by the plaintiff or defendant, of *simple denial* always *tendered an issue,* the tender being made by using the formula heretofore given.[5] The *verification* was necessary in all other pleas, and this included those in avoidance, or which set up new facts or circumstances The rule was complied with by concluding the plea with

5 See Steph Pl 200

the formula, "and this the plaintiff (or, defendant) is ready to verify." If this rule still existed, the preceding form, No. 3, would properly conclude with a *verification*, while Form No. 4 would conclude with a *tender of issue*. But the rule requiring a conclusion by verification has been laid aside as a part of the rubbish of the common law, and would now be deemed harmless surplusage.

Other illustrations might be given in which the issue would be formed at a more remote point in pleading than the defendant's rejoinder, but enough has been said to enable the student to understand the meaning and the manner of applying the rule, which requires the parties to proceed in their pleadings until one party shall affirm a fact which is denied by the other, and thus reach an issue

§ 5. The defendant may plead as many *pleas* as he has real grounds of defense,[6] though the several grounds may be such as to justify pleas which are apparently inconsistent.[7] It may be necessary to the justice of his case that the defendant should be allowed to deny in one plea what the plaintiff alleges, and in another to avoid it, which in law is an admission by one plea of what he denies by another. But that admission does not relieve the plaintiff from the burden of proving what is expressly denied by the other plea.[8] The implied admission in such a case is merely hypothetical; it means if the fact denied is true, that is, if the plaintiff proves it to be true, then it is admitted, and the defendant relies on the matter of avoidance, but if the plaintiff does not prove the fact

6 § 3617, M & V This rule does not apply to replications Redly v Buchanan 2 Swan 558 But to a set off the plaintiff may of right file as many replications as he has defenses, for the reason that he in effect is the defendant as to the set off pleaded against him (Redly v Buchanan, 2 Swan, 558) and in any case the plaintiff may file more than one replication by leave of the court § 3642, M & V

7. Kelly v. Craig, 9 Humphr. 216; Noel v McCrory, 7 Coldw 628.

8. Noel v. McCrory, 7 Coldw 623

denied, then there is no use for any evidence of the avoidance, and that being its legal import, it would seem the most apt form of pleading matter of avoidance in company with a plea of denial is to plead it hypothetically.

In the form of notice of defenses under the general issue, may be seen what the author would consider a proper form of special pleas in such a case.

§ 6. The plea should answer *material*, and not immaterial allegations A material allegation is one without which the pleading in which it appears would not be sufficient a fact which constitutes the whole or an essential part of the cause of action, and no other fact is material in the declaration A fact which might be struck out and still leave a good cause of action is immaterial, and so of other pleadings Whatever fact essential to make the plea a good defense, or the replication a good reply, is material, all others are immaterial, and might be struck out for prolixity A denial of such a statement would make what is called an *immaterial issue*. Let it be tried and decided either way, the case is not decided, the verdict is set aside as amounting to nothing Such a plea would be struck out as frivolous, and so would a plea in avoidance of an immaterial statement

If a plea, replication, or other pleading is not a sufficient answer to the adverse statement, admitting it to be all true, then it is not to be denied, for that would make an immaterial issue, nor is it to be avoided by an answer of new facts, for that could only lead to an immaterial issue. The course is to demur to it, if it presents a plausible face of sufficiency, and if it does not, move to strike it out as frivolous.

A party may answer the allegations of his adversary either by plea or demurrer, but not in both ways If, however, the declaration contains two counts, the defendant may demur to one and plead to the other If there

are two pleas or replications, one may be demurred to, and the other answered by denial or avoidance.[9]

It must be remembered that a plea in bar is a waiver of preceding irregularities. If there is anything wrong in the issuance of the writ in its form or substance, in its delivery to the sheriff, or its service on the defendant, or even if not served at all, all is waived by a plea in bar. The only way to take advantage of these irregularities is by plea in abatement, or its substitute, a motion to quash.

But a plea in bar does not waive the *insufficiency* of the declaration; judgment may afterward be arrested for that Nor does an answer to any pleading admit its sufficiency, but it does admit that the pleading which it answers has come regularly into the files.

§ 7. Either party may, at any time in the progress of the cause, file a supplemental pleading alleging any material facts that have happened or come to his knowledge since he filed his former pleading. But he has to show good cause for it, and obtain leave of the court[10] Good cause would be an affidavit showing that the pleading was necessary to the attainment of justice. Although the fact was known to him when he first pleaded, still he will be allowed to plead it on good cause shown, by an affidavit of its truth, its importance, and why he did not plead it sooner. It is merely amending the pleadings by supplying an omission in them

§ 8. In the last chapter it was seen that there are certain defenses not included in the general issue which, if relied on, *must* be specially pleaded, but it must be remembered that the defendant may use both methods, that is, he may plead the general issue, and at the same time plead specially, and this is done in practice though the

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9. § 3615, M & V, Steph Pl 273. 10. § 3598, M & V.

matter specially pleaded be included in the general issue. Having pleaded the general issue, it would, of course, be unnecessary to repeat by special plea, the matters of defense included in it, and such special plea might be struck out as surplusage, but its continued presence on the record would not be reversible error.

In the succeeding sections of this chapter it will be the purpose to give illustrations in pleading certain defenses, which are usually not included in the general issue, and which must therefore be specially pleaded; and then of certain defenses which, as a rule, are included in the general issue, but which the pleader may at his election plead specially.

Of the first class of defenses, those that must be specially pleaded, an example has been given in the plea of the statute of limitations; another illustration is the plea *non est factum.* This applies only in actions brought upon written contracts, where the party wishes, first, to deny the execution of the contract, or, second, to allege an unauthorized and material alteration in the writing since the defendant signed or executed it (*a*) The first form is called a general plea of *non est factum,* not in the sense of general *issue,* but because it purports to deny *in toto* the execution of the instrument sued on; the other form is called a special plea of *non est factum* for the reason, which is apparent, that it is only a qualified denial of the execution of the paper. They are both special pleas

(*a*) At common law the plea *non est factum* was directed at the *description* of the instrument as set out in the declaration, and so it was properly used if there was a *variance* between that description and the instrument of which *profert* was made 1 Chit. Pl 433 But in such case if the defendant craved oyer and set out the instrument in his plea, this cured the variance, and the plea *non est factum* on that ground would then be bad In Tennessee *non est factum* is directed at the *instrument,* not at the description of it in declaration, so that a variance does not justify the use of the plea. §§ 3619, 3650, M & V, Form No. 1.

as distinguished from the general issue. Illustrations of both forms are here given:

No. 7. Non est Factum, General.

The defendant for plea says the note (or, the instrument) upon which the plaintiff's action is founded was not executed by him, or by any one authorized to bind him in the premises [11]

E F,
Attorney.

The defendant makes oath that the above plea is true (or, if filed by an executor or administrator, that he believes it to be true)

C D,
Defendant

Sworn to and subscribed before me, this 22d day January, 1887

G H,
Clerk.

No. 7. Non est Factum, Special.

The defendant for plea says the note upon which the plaintiff's action is founded has been materially altered since the defendant executed and delivered the same, by changing the date of payment thereof from January 1, 1887 the true date, to January 1, 1886, a

11. It has been decided in Tennessee that a plea by the defendant in these words "The defendant did not undertake and covenant as the plaintiff in his motion hath alleged" is in substance a plea of *non est factum*, and must be sworn to State *v* Thompson, 2 Heisk. 147 This decision is not sustained by the general law or by the principles of pleading in force in Tennessee. The very words condemned by the court as amounting to *non est factum* are to be found in the form of general issue given in section 3650, M & V By the use of them it is not intended to, and under the rules of pleading they do not, put in issue the execution of the writing which constitutes the foundation of the action They relate to and put in issue to the extent of the general issue in *assumpsit* the allegation of the pleading answered The plea *non est factum* is addressed not to the pleadings which it follows but to the writing which constitutes the foundation in whole or in part of the action, and says specifically the defendant did not *execute*, etc The effect of this decision, if followed, would be to make the general issue *non assumpsit* in every action upon a written contract equivalent to *non est factum*, and so not good, unless sworn to, which is in conflict with the general law on that subject The ground of the decision may be found in the peculiar manner in which the question arose in the case, it being a proceeding by *motion* against a clerk and sureties on his official bond. The reasons for such a decision in any case are, however, not apparent, and are not given in the opinion of the court

false date, and that said alteration was not made by this defendant, or by any person authorized to bind him in the premises
[To be sworn to and signed as above.]

All pleas of *non est factum* must be sworn to.

§ 9. On the trial of the issue formed under the general plea of *non est factum* the burden of proof is cast upon the plaintiff to show the due execution of the note or other written contract. If the issue is formed under the special plea of *non est factum,* the burden is upon the defendant to show the alteration.[12] Under the first the plaintiff cannot read the note or other contract until he has shown in the proof *prima facie* its due execution. Under the latter he may in the first instance introduce it as evidence As to the special plea *non est factum,* there can be no difficulty as to the evidence on the part of the defendant He would be allowed only such evidence as reflects upon the particular ground set out in his plea, that is, the question of alteration

What may be shown in evidence by the defendant under the general plea *non est factum* may be a matter of more difficulty. It has before been stated that at common law this plea was called the general issue in debt on specialty and covenant Treated as a general issue, the defendant at the trial might introduce evidence showing not only that he never executed the note, but also that it was absolutely void in law, as, for example, that the defendant, at the time of execution, was a married woman or a lunatic. This rule, which is well sustained by common-law authorities, cannot be the existing rule in Tennessee The common-law form of *non est factum* is: "The defendant says the supposed writing obligatory *is not his deed.*" The form in Tennessee is: "The defendant did not *execute* the note," etc. It would seem to be easy to proceed

12 Carter *v* Turner, 5 Sneed, 183, Brown *v* Phelan, 2 Swan, 630, Bumpas *v* Timons, 3 Sneed, 461, Iohl *v* Fernberger, 10 Heisk 38, Harding *v* Walters' Heirs, 6 Lea, 324, 2 Greenl Ev , § 300

from the words, "*not his deed,*" to the proposition that if the instrument was in law *void* at its execution, it was *not his deed,* and so to allow evidence of that fact. But in Tennessee the much more restricted form *did not execute,* which means that he did not *sign, seal,* and *deliver,*[13] would narrow the point, according to the natural and legal import of the words used, to the single question, the actual "signing, sealing, and delivering," and this it is believed is the limit to be allowed the defendant in his proof. Such is the effect of the change of the common-law rule in England under the Act of 4 Wm. IV which says. "The plea of *non est factum* shall operate as a denial of the execution of the deed *in point of fact only,* and all other defenses shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable only,"[14] and a like effect has doubtless followed in Tennessee on the adoption of the Code. This does not in any degree cut the defendant off from making his true defense, for all such defenses as coverture, lunacy, infancy, duress, and the like, which make the deed void or voidable, may be presented in defense by special pleas without resort to the plea of *non est factum* at all, thus leaving that plea for cases where the execution *in point of fact* is denied, and where, indeed, the true construction of Tennessee law has left it.

§ 10. Set-off and *recoupment* are defenses that must be specially pleaded. They are, in effect, cross-actions, and are allowed primarily to prevent circuity of action. The distinction between the two is this. Set-off consists of a demand, not connected with or arising out of the plaintiff's demand, existing at the commencement of the action, in favor of the defendant and against the plaintiff,[15]

13. Rap. & L. L. Dict.
14. 1 Chit. Pl. 518.
15. 2 Pars. Cont. 733, 740, 2 Bouv. L. Dict.

while *recoupment* relates only to cross-demands, inseparably connected with and necessarily arising out of the contract upon which the plaintiff sues.[16] To be good as set-off or recoupment, the demand must, in either case, be sufficient to support an independent action by the defendant against the plaintiff.[17]

The demand sought to be set off need not have been due and payable at the commencement of the plaintiff's action, but it must be due and payable *at the time it is pleaded*.[18] So the defendant must have been the owner of the cross-demand at the *commencement of the suit*. He will not be permitted in a court of law to set off claims purchased after the plaintiff has commenced his action.[19] Only mutual demands can be set off, that is, mutual in the sense that they subsist between the same parties; thus, a debt due from C. to A. and B., as partners, cannot be set off by B. against a separate debt due from him to C.[20] The right of set-off applies only in actions upon contracts having no application whatever to actions *ex delicto*.[21] Only such demands as would be recoverable in an action of debt or *indebitatus assumpsit* can be set off, and hence uncertain or unliquidated damages are not pleadable as such.[22] But damages sustained by the defendant, though unliquidated, arising out of the plaintiff's imperfect performance of the contract on which he sues, may be relied

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16 Rap & L. L. Dict. · N. & C. R. R. *v.* Chumley, 6 Heisk. 325.

17 § 3028, M. & V. 2 Pars. Cont. 742.

18. § 3268, M. & V., 2 Pars. Cont. 742, Keith *v.* Smith, 1 Swan, 93.

19 Keith *v.* Smith, *supra*, Brazelton *v.* Brooks, 2 Head, 194, Bank *v.* Chapman, 19 Johns. 322. This is allowed, however, in equity, where the defendant in the action at law comes into that court alleging the insolvency of the plaintiff at law, and praying the relief. Fields *v.* Carney, 4 Baxt. 137, Miller *v.* Andrews, 3 Coldw. 384.

20 Turbeville *v.* Broach, 5 Coldw. 272, Flint *v.* Tillman, 2 Heisk. 204.

21. Dean *v.* Allen, 8 Johns. 390; Brady *v.* Wasson, 6 Heisk. 134.

22. Bolinger *v.* Gordon, 11 Humphr. 62.

upon by the defendant in *recoupment*;[23] the damages in such cases, however, must be capable of computation with reasonable certainty, and not mere speculative profits and losses.[24]

The cross-claim must be a legal subsisting demand. If it be barred by the statute of limitations, it cannot be pleaded as set-off. But in determining whether the set-off demand is barred or not, the time must be reckoned from the commencement of the plaintiff's action, and not from the date when the defendant filed his plea.[25]

The following are illustrations of the two pleas, set-off and recoupment

No. 8. Set-off.

The defendant for plea says that at the time the plaintiff's action was commenced the plaintiff was indebted to him in the sum of one thousand dollars by note, here to the court shown, dated January 1 1888, and due one day thereafter which he hereby offers to set off against the plaintiff's demand, and he prays judgment for the same

No. 9. Recoupment.

The defendant for plea says that the consideration of the note described in the plaintiff's declaration was the agreement of the plaintiff to build a dwelling-house for the defendant, and that the material used in its construction should be well-seasoned lumber, and

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23 Porter *v* Woods, 3 Humphr 56, Whitaker *v* Pullen, 3 Humphr 466, Cruch *v* Miller, 5 Humphr 587, Overton *v* Phelan, 2 Head 444

24. Pettee *v.* Tennessee Mfg Co, 1 Sneed, 381. Some very narrow distinctions have been made in the Tennessee decisions in applying the law of recoupment. In one case it is held that if the seller of a chattel who conceals invisible defects afterward sues for the stipulated price of the article, the defendant may, under his plea of recoupment, reduce the stipulated price to the actual value of the article Sample *v* Looney, 1 Tenn 85 See also Hogg *v* Cardwell, 4 Sneed, 158 But it is also held that if there be a sale and delivery of a chattel with *warranty of soundness*, and the warranty be broken, the buyer, on being sued for the price, cannot recoup the plaintiff's demand by the damages resulting from the breach of warranty It is said the warranty and the agreement to pay the price were *independent* contracts, and so the damages sustained by the defendant did not arise out of the contract sued on. Henning *v* Vanhook, 8 Humphr 678.

25. Stone *v.* Duncan, 1 Head, 102, Williams *v* Lenoir, 8 Baxt. 397.

the roofing first-class tin The defendant says plaintiff breached his contract in this, the material used was green lumber, and the roofing was pine shingles Defendant says he has been damaged by reason of said breaches in the sum of five hundred dollars, for which he prays judgment, and that the same be deducted from the plaintiff s demand

Neither of these pleas make an issue. A replication is necessary, and the plaintiff may put in as many replications as he has defenses, as a matter of right, for the reason that as to the cross-claim, the plaintiff becomes a defendant, and his replication is in character the same as a plea to the declaration [26] The defendant is restricted ordinarily to one replication, but by leave of the court he may in any case file more than one [27] The defendant may reply to the plea of set-off or recoupment any matter which would be appropriate as a defense if the cross-claim were being prosecuted against him in an independent suit, except the defense of set-off; he is not allowed to reply a set-off to a set-off.[28] The status of the defendant under his plea of cross-claim is so much that of a plaintiff that the plaintiff in the suit where such defense has been made cannot defeat the defendant by dismissing the action, but the latter will in such event be permitted to prosecute his cross-demand to judgment.[29] And so, contrary to the rule, heretofore existing in Tennessee, if the plaintiff fails wholly to establish his claim against the defendant, judgment may yet be rendered in favor of the defendant upon proof of his set-off.[30]

As the plaintiff when met by a plea of set-off becomes practically a defendant, so his replication to such a defense is in effect a *plea,* and does not differ in form from

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26. Ridly v Buchanan, 2 Swan, 550, Williams t Lenoir, 8 Baxt. 398, Williams t Ledsinger, 7 Baxt 429

27. § 3042, M & V

28 2 Pars Cont 737, Russell v Miller, 54 Pa St 134

29 Riley v. White, 3 Humphr. 231; Galbraeth v Railroad, 11 Heisk 169

30 § 4936, M & V.

the pleas given in this chapter. The name of the pleading, however, should be preserved. The form should be, "the plaintiff for *replication*," etc., and not "the plaintiff for *plea*," etc. Any of the forms of pleas given herein may be easily changed to a good replication to the plea of set-off, and it is not necessary to extend the text with useless illustrations. It should be remarked that set-off is a defense which the defendant may use or not at his pleasure. If he forbears doing so, this in no way impairs his right to establish his claim by a separate action.(*a*)

§ 11. Tender is a defense which must be specially pleaded. It is an offer if the matter be a money demand by the debtor to his creditor of the amount of the debt. The offer may be in any current funds in common circulation as money, unless the creditor refuse the offer because the currency tendered is not lawful money or legal tender,[31] and then to be good the tender must be made in gold or silver or United States treasury notes, commonly known as "greenbacks." These alone are made "legal tender" in the payment of debts by the Federal Constitution and laws of Congress.[32]

The tender must be made at or after the maturity of the debt and before commencement of suit[33] It must be of the whole debt, principal and interest,[34] and it should

(*a*) Gregory *v.* Hasbrook, 1 Tenn Ch 221, Palmer *v.* Malone, 1 Heisk 549, 2 Pars Cont 741

31. Ball *v.* Stanley, 5 Yerg 200, Cooley *v.* Weeks, 10 Yerg 142; McDowell *v.* Keller, 4 Coldw 266, Noe *v.* Hodges, 3 Humphr 162, 2 Pars Cont 645

32 Const U S, art 1, § 10, Knox *v.* Lee and Parker *v.* Davis, 12 Wall 457 This does not prevent the making of contracts for receiving in payment other than legal tender money, and in such case a tender of the funds contracted for is good So a party may contract for the payment of gold, and then gold only would be a good tender Trebelock *v.* Wilson, 12 Wall 457, Willis *v.* Allison, 4 Heisk 390

33 Miller *v.* Andrews, 3 Coldw. 384, McDowell *v.* Keller, 4 Coldw 266

34 2 Pars Cont 639 Farnsworth *v.* Howard, 1 Coldw 217, 2 Greenl Ev, § 601, Dixon *v.* Clark, 5 C. B, 5 Dowl & L 155, Boyden *v.* Moore, 5 Mass 365

be offered unconditionally.[35] The money must be *produced* at the time ready to be counted, but words or acts by the creditor unequivocally manifesting an intention not to receive the money will be a waiver of its production.[36] The tender need not be made by the debtor personally, if made by a third person, at his request, it is sufficient. Nor is it necessary to make the tender to the creditor personally. It is good if made to an agent who is authorized to receive the money.[37] A tender of money does not discharge the debt, but it stops the accruing of interest on it, and protects the defendant from costs if the debt is subsequently put in suit. But to have this effect the defendant must continue always ready and willing to pay the sum tendered; for if the creditor should, before suit and after the tender, demand the sum tendered, and it be refused by the debtor, the benefit of the tender is lost.[38] And so, to be effective the *plea* must aver that the defendant has always been and still is ready to pay the money tendered, and that the same is now produced and tendered in court.[39]

If the contract is to pay something else than money, as wheat, or cattle, or other specific article, tender properly pleaded and sustained in the proof has the effect to absolutely discharge the debt, and vest the title to the article in the creditor.[40] The plea in such case, to be good, must aver that the defendant was ready on the day and at the place specified in the contract to deliver the articles, that they were offered to the plaintiff and he re-

35. Bevens *v* Rees, 5 M & W. 306, 2 Pars Cont 644, 2 Greenl. Ev, § 605

36. Farnsworth *v* Howard, *supra;* Thomas *v* Evans, 10 East, 101, 2 Greenl. Ev, § 602

37. 2 Pars. Cont 639, 2 Greenl Ev, § 606

38. 2 Pars Cont. 645, 2 Greenl Ev, § 608, Gracy *v.* Potts, 4 Baxt 395

39. 2 Greenl Ev, § 600; Keys *v.* Roder, 1 Head, 20

40. Slingerland *v* Morse, 8 Johns 474, Case *v* Green, 5 Watts, 262; 2 Pars Cont 652, and note, § 3637, M & V.

fused to receive them, or that neither the plaintiff nor any one for him was present during the day to receive them, and that the defendant has always been ready and willing to deliver the same.[41] Whether it be a tender of money or property, the plea in substance should aver facts, showing that the debtor has done all that any debtor could do toward the fulfillment of his obligation, leaving nothing to be done toward its accomplishment but the act of acceptance on the part of the creditor;[42] and such a plea upheld in the proof relieves the defendant from interest and costs in the one case, and discharges the contract in the other.

The following examples are submitted, illustrating the form of pleas in the two cases, tender of money and tender of specific articles:

No. 10. Tender of Money.

The defendant for plea says that after the plaintiff's action accrued, and before suit brought, he tendered to the plaintiff the sum of five hundred dollars, which was the full amount due the plaintiff on the note described in the declaration, but the plaintiff refused to receive the same The defendant has always been and still is ready to pay said sum to the plaintiff, and he now produces it in court with his plea, and tenders the same to the plaintiff

The money must be actually brought into court with this plea, and deposited with the clerk, there to remain subject to the orders of the court on the final hearing The defendant is entitled to have an entry on the minutes, reciting and directing the deposit with the clerk.[43] The money having then gone into the hands of the clerk by

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41 Miller *v* McClain, 10 Yerg. 245, Nixon *v* Bullock, 9 Yerg. 414

42. 2 Greenl Ev , § 600, Keys *v* Roder, 1 Head, 20

43. § 3636, M & V ; McNairy *v* Bell, 1 Yerg 502; Keys *v* Roder, 1 Head, 20. No case in Tennessee has been found directly sustaining the text as to the entry on the minutes, but it is well supported by the practice under the ancient defense of "*bringing the money into court*," referred to in Keith *v.* Smith, 1 Swan, 92

virtue of his office, he and the sureties on his official bond would be liable for its safe-keeping [44]

No. 11. Tender of Specific Article.

The defendant, for plea, says that he tendered to the plaintiff at his mill, in the town of Lebanon, on the 22d January, 1887, one thousand bushels of wheat, but the plaintiff refused to receive the same The defendant avers that said tender was a full performance of the contract in the plaintiff's declaration mentioned Defendant is still in possession of said wheat, which cannot, by reason of its great bulk, be exhibited with this plea, and he has always been and still is ready and willing to deliver, and hereby tenders the same to the plaintiff

This plea supposes the case of a declaration upon a contract for the delivery of one thousand bushels of wheat on a day and at a place certain, in which the breach, a failure to deliver, is alleged The plea taken in connection with such a declaration shows that the defendant has done all that any debtor could do in performance of his obligation, and that there remains for its consummation only an acceptance on the part of the plaintiff. If the article is capable of being produced in court, then it should be done, and delivered to the clerk, as in the case of money; as if it be notes upon third parties, or bank notes, or a watch, or the like; but if it be cumbersome or of great bulk, as hogsheads of sugar, or bales of cotton, or barrels of oil, or live animals, as cattle, or horses, or the like — the averment that the articles are still in the possession of the defendant, and that he is ready and willing, and therefore able to produce them is sufficient [45]

The plea of tender does not make an issue, and a replication from the plaintiff is necessary. Perhaps no case

44. Buford *v* Cox, 3 Lea, 318

45 2 Pars Cont 647 See § 3636, M & V This, and the succeeding section, 3637, of the Tennessee Code, only requires money and a *thing in action* to be brought into court, the averment of a readiness to deliver *other* personal property being sufficient What is included in the words a *thing in action* in the connection used has not been settled by the courts.

would require any other than the general replication which makes an issue, and which is given before in Form No. 2.

§ 12. The truth of the words published or spoken, called a plea of "justification," must be specially pleaded in actions of libel or slander The following form is submitted as an illustration of the plea in such cases·

No. 12. Justification, Libel, or Slander.

The defendant, for plea, says that before he spoke (or, published) the words specified in the declaration, the plaintiff was guilty of perjury, in this In a suit brought by this defendant against one John Den, on a note for one thousand dollars in the Circuit Court of Wilson county, Tennessee, and which came on for trial at the January term, 1887, of said court, it became a material question whether the said John Den had paid to this defendant the sum of five hundred dollars on said note. The plaintiff, on the trial of said cause, was sworn and examined as a witness in behalf of the said John Den, and willfully and corruptly deposed that this defendant had acknowledged to him that the said John Den had paid to him, this defendant, the said sum of five hundred dollars on said note, whereas the plaintiff well knew this defendant never had made any such acknowledgment

This plea would be applicable to Declarations Nos. 24, 25, and 26, given before in Chapter IV. If the declaration is for slander, then the words, "before he spoke," etc., and if for libel, "before he published," etc., are the appropriate words of the plea

If the defamatory words spoken or published are a charge of larceny, instead of perjury, the plea to the declaration would be much shorter than the foregoing form, thus:

No. 13. Justification, Libel, or Slander.

The defendant, for plea, says that before he spoke (or, published) the words specified in the declaration the plaintiff was guilty of larceny in this, that he did feloniously take and carry away one black horse of the value of two hundred dollars, the property of this defendant

At the common law the replication to the foregoing pleas of justification was a kind of traverse called *de injuria sua propria absque tali causa,* or more compendi-

ously the traverse *de injuria*.[46] The reader is left to consult at his leisure the authorities referred to in the note for an elucidation of this replication, and to indulge a natural feeling of wonderment that the ancient pleader did not directly meet the charge in the plea by a square denial, which in legal effect is all the involved sentences of *de injuria* amount to. The general replication now in use (Form No. 2) serves the same end, and as it is more upon a level with the common understanding of courts, lawyers, and juries, it should be used.

It has been intimated in Tennessee and decided elsewhere that a plea of justification in libel or slander must have the certainty of an indictment for the particular offense charged.[47] It need not be clothed in the technical language usual in criminal pleading. Technical language is dispensed with even in indictments, and so are time and place when not of the essence of the offense. The foregoing forms are sufficient under existing law.[48]

An issue formed by a general replication to either one of the above pleas presents the single question, the guilt or innocence of the plaintiff under the charge contained in the plea. The burden is on the defendant, and he must prove the truth of the words beyond a reasonable doubt, and this, it is held, cannot be done by less than two witnesses, or one witness and strong corroborating circumstances.[49] A plea in justification not sustained may be looked to by the jury as proof in aggravation of damages.[50]

§ 13. *Son assault demesne* must be specially pleaded. It is a plea in justification, and applies in actions for assault

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46 Crogate's Case, 1 Smith Lead Cas. (6th Am. ed.) 232, 1 Chit. 605, 2 Chit. 1186, 1201, Steph. Pl. 163.

47 Cannon *v.* Phillips, 2 Sneed, 186, Woolback *v.* Keller, 6 Cow. 118, Clark *v.* Dibble, 16 Wend. 602.

48. §§ 5943, 5944, 5953, 5954, M. & V., State *v.* Parker, 5 Lea, 568.

49 Coulter *v.* Stewart, 2 Yerg. 226, Hill *v.* Goodyear, 4 Lea, 233.

50 Robinson *v.* Drummond, 3 Am. L. Reg. (O. S.) 55; Wilson *v.* Nations, 5 Yerg. 210.

and battery. Its effect is an admission on the part of the defendant that he made the assault, but it alleges in justification thereof that the plaintiff first assaulted the defendant, and that the assault complained of was committed by the defendant in self-defense, or in the defense of a father, or mother, or wife, or son. Its form would be as follows.

No. 14 Plea: Son Assault Demesne.

The defendant, for plea, says he committed the assault and battery complained of in the plaintiff's declaration in the necessary defense of himself (or, of E D, his father, or, etc) against an assault and battery committed on him by the plaintiff

§ 14. The plea *molliter manus imposuit* must also be specially pleaded. It is of the nature of the last above plea, but is applicable in cases where the assault complained of was committed in defense of property. In it the defendant admits the assault and battery, but justifies the act complained of by saying he *gently laid his hands* on the plaintiff, that is, used only such force as was necessary to protect his property. Thus:

No. 15. Plea: Molliter Manus Imposuit.

The defendant, for plea, says that the plaintiff was attempting by force and violence to take the defendant's horse from him, when this defendant committed the assault and battery complained of, but he assaulted and beat the plaintiff only so far as was necessary to resist said attempt.

To both the above pleas the traverse *de injuria* was applicable at common law, but the general replication (Form No. 2) is now appropriate, which puts in issue the facts alleged as the excuse or justification for the assault and battery, and of course under such an issue evidence of any other matter would be inadmissible. If the truth be as alleged in Form No. 14, that the plaintiff did first assault the defendant, but was justified in doing

so because the defendant was assaulting the plaintiff's wife, that fact should be specially replied; and so if the truth be as alleged in Form No. 15, that the plaintiff was using force in attempting to take the horse from the defendant, but was justified in doing so because done in the execution of process in his hands as an officer, he should specially reply the facts As an illustration of a special replication to a plea of justification, the following is given in reply to plea, No. 14.

No. 16 Special Replication to Plea: Justification.

The plaintiff, for replication, says the defendant was assaulting E D, the plaintiff's wife, when the plaintiff, in the necessary defense of his wife against said assault, committed upon the defendant the assault and battery mentioned in the plea.

If the charge in the declaration is false imprisonment, and the defendant wishes to rely upon the fact that he imprisoned the plaintiff under legal process, he must specially plead it. This also is a plea in justification, and it may be in the following form

No. 17. Plea: Justification under Legal Process.

The defendant, for plea says that he is sheriff of Wilson county, Tennessee and that he did, in the performance of his official duty, imprison the plaintiff for the time specified in the declaration, in obedience to a mittimus addressed by R L C White a justice of the peace of Wilson county to this defendant as sheriff, commanding him to receive into his custody and detain the plaintiff until he should be legally discharged

The general replication, Form No. 2, would be the appropriate reply to this plea.

§ 15. It is not considered important to further confine the illustrations of forms to defenses that *must* be specially pleaded, and the larger part of those hereafter given will therefore relate to defenses that are included in the general issue and need not be specially pleaded.

If the suit is upon a written contract, the writing, until it is overthrown, is conclusive evidence of the contract.

It can be overthrown in two ways only: First, by denying its execution, with a plea of *non est factum,* an illustration of which is given in a previous part of this chapter; second, by pleading some fact which shows that, if the defendant did execute it, it was void or voidable, as that he was insane, or drunk, or a minor, or under duress, that she was a *feme covert,* or that the consideration was unlawful, as that it was for a gambling debt, or to procure the commission of crime, or suppress a prosecution. Under such defenses as these, the burden in the proof is upon the defendant. All these last-mentioned defenses, it will be seen by referring to the chapter on the general issue, are included in that plea, but they may be specially pleaded, and a few forms of such pleas are now given.

No. 18. Plea: Insanity.

The defendant, for plea, says he was insane when he executed the note on which the plaintiff's action is founded.

The general replication (Form No 2) would be the appropriate reply to this plea, if the plaintiff does not admit the insanity of the defendant, and, under the issue thus formed, the burden would be on the defendant to show in the proof that he was insane as alleged. It may be of profit to the student to state again that, in every case where the disability pleaded conflicts with the presumption of legal capacity, the burden is upon the pleader to establish the disability in the proof If the plaintiff admits the defendant's insanity, but wishes to avoid it, he must reply specially the matter in avoidance, thus:

No. 19. Special Replication.

The plaintiff, for replication, says that the note sued on was given for the reasonable value of necessary clothing, which he sold and delivered to the defendant [51]

51. It is settled law that a lunatic cannot avoid his contract for the procurement of necessaries, if the party dealing with him acted in good faith, and the rule is not restricted to absolute necessaries,

To this replication, a general rejoinder would be appropriate, thus:

No. 20. General Rejoinder.

The defendant joins issue on the replication.

This puts in issue the whole replication, and hence admits of evidence on the part of the defendant, first, that the sale and delivery of clothing was not the consideration of the note, and second, if the sale and delivery of clothing was the consideration, that the price charged was unreasonable If the defendant succeeds on the first ground, it would defeat the plaintiff's action; but, failing in that, if he succeeds on the latter, it would then be a question for the jury on the proof submitted to them, to determine the reasonable value of the clothing According to the principles of law stated in the last foot-note (51), the replication to the plea of insanity may be thus.

No. 21. Special Replication.

The plaintiff, for replication, says that, at the time the note sued on was executed, the defendant was apparently of sound mind, and plaintiff had no notice of his insanity

The general rejoinder (Form No. 20) to this replication would raise the single question: did the plaintiff, at the time the note was executed, know of the defendant's mental infirmity? On the trial of this issue, the burden is on the plaintiff Proof of actual knowledge is not required Circumstances shown to exist, within the knowledge of the plaintiff, that would put a prudent person on the inquiry, or from which knowledge may be reasonably

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but would include such things as are useful to him, and proper for his means and station And so a contract made *bona fide* with a lunatic, who is apparently sane, or whose insanity the other party has no reason to suspect, cannot be rescinded unless the other party be placed in *statu quo* 1 Pars Cont 385, and cases cited

inferred, is all the general rule of law requires in fixing the knowledge of a particular fact upon a party to be charged therewith. So, the defendant might show, by the admissions of the plaintiff, actual knowledge of the insanity, or show circumstances from which the law would imply knowledge, the general reputation of the defendant in the plaintiff's neighborhood, insane acts of the defendant of public notoriety, and the likelihood that they had reached the ears of the plaintiff, an inquisition of lunacy, confinement at the asylum, and the like The plaintiff, in the first instance, the burden being on him, would of course be allowed to support his replication by any facts tending to show its truth, as that he did not live in the defendant's neighborhood, that he had no acquaintance with him before the transaction in question, the personal appearance of the defendant, his intelligence and general deportment, in short, any characteristic of the defendant calculated to induce belief in others of his sanity, or to conceal from them his insanity.

§ 16. Infancy is another defense of the class now being considered, and it may be pleaded thus:

No. 22. Plea: Infancy.

The defendant, for plea, says he was an infant under the age of twenty-one years when he executed the note which is the foundation of the plaintiff's action

The general replication would put in issue the fact of infancy, as stated in the plea, and nothing else. Any matter in avoidance must be specially replied. If the debt sued for, whether due by note or account, was for necessaries, this should be replied, and the replication would be as in Form No. 19 If the defendant, after he became of age, promised the plaintiff to pay the debt, the plaintiff may avoid the plea of infancy by replying the new promise, thus:

No. 23. Replication: New Promise.

The plaintiff, for replication to the plea of infancy, says the defendant came to the age of twenty one years after he executed the note sued on, and after he came to said age, and before the com mencement of this suit, he promised to pay (or, ratified) said note

To this replication the defendant might rejoin specially by denying either the new promise, or that he was of age when he made the new promise, and either would be a sufficient answer, or, he may deny both facts, by using the general rejoinder, Form No. 20

If the defense is the statute of limitations, as in Form No. 1, a new promise may be replied thus

No. 24. Replication: New Promise.

The plaintiff, for replication, says the defendant promised to pay the note sued on within six years before suit brought

The defendant may join issue on this replication (Form No 20), or rejoin matter in avoidance, as insanity, duress, coverture, and the like, thus:

No. 25. Rejoinder: Coverture.

The defendant, for rejoinder, says that, at the time of making the promise mentioned in the replication, she was the wife of John Den.

Or.

No. 26. Rejoinder: Duress.

The defendant, for rejoinder, says that, at the time of making the promise mentioned in the replication, he was unlawfully imprisoned by the plaintiff, and by him then and there detained until, by reason of the force and duress of such imprisonment, the defendant made said promise

To each of these rejoinders, a general sur-rejoinder from the plaintiff would be appropriate, thus:

No. 27. General Sur-Rejoinder.

The plaintiff joins issue upon the defendant's rejoinder

§ 17. There is another class of defenses, not yet noticed, relied upon, in *discharge* or in performance of the contract

sued on, which in some actions *must* be specially pleaded, and in others, though included in the general issue, *may* be specially pleaded. The first of these to be noticed is payment, which is pleaded thus.

No. 28. Plea: Payment.

The defendant, for plea, says he paid the debt for which this suit is brought before the commencement of the action.

Payment is a defense which can be made only to actions founded on contracts express or implied for the payment of money It admits the contract as stated on the face of the declaration, and relies upon the performance of it. If the payment is in money and of the full amount promised, it is good in law, independent of the creditor's consent to receive it as payment. But if the payment be in something else than money, or in a sum less than the amount due, the acceptance of it as payment by the creditor is necessary to make it so. In such case the plea may allege the acceptance, though it is not necessary to do so. The fact of acceptance may be shown in the evidence under the simple plea of payment.[52] It is frequently said and so the law has been held in many cases that a payment of part of the debt is not a satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand.[53] But in Tennessee, if the payment be evidenced by writing, as a receipt, for a less sum in payment of the whole amount due, it would be conclusive, according to the intention of the parties.[54] And other well-recognized exceptions to the rule exist, as where the part payment is the result of a

52 2 Greenl Ev, § 516

53 Fitch *v* Sutton, 5 East, 230, Watkinson *v* Inglesby, 5 Johns 386, Deadrick *v* Leman, 9 Johns 333, Seymour *v* Minturn, 17 Johns 174, 2 Pars Cont 618.

54 § 4538, M. & V., Love *v* Allison, 2 Tenn Ch 114

well-understood and executed compromise,[55] or where there is a new consideration for the release, as if a part be paid before all is due, or in a way more beneficial to the creditor than that prescribed by the contract.[56] To be good the payment must be made to the creditor or to an agent authorized to receive it. It may be made in anything of value which the creditor will accept. A payment in *genuine* bank notes supposed by both parties to be good at the time is valid, though the notes be worthless, but otherwise if the notes be *not* genuine.[57] Payment may be pleaded in the form of accord and satisfaction, but it is not so simple. To the plea of payment there can be no other reply than the general denial, Form No. 2.[58] If the transaction amounted to a legal payment there can be no avoidance of it. If it did not, as if the money paid was counterfeit, it may be shown in the evidence. The acceptance by the creditor of anything of value in payment may be shown in evidence as proof of the truth of the plea, and so fraud or other fact may be shown in disproof of it.[59]

§ 18. The defense of accord and satisfaction applies in all actions for the recovery of a debt or damages, whether founded on contract or tort. In so far as it is applicable to actions for the recovery of a sum agreed on, it is substantially the same as payment, and in that respect it need not be further noticed. It is used, however, as a defense in actions for the recovery of *unliquidated damages*, in which payment is not applicable. The form of the plea is as follows:

No. 28. Accord and Satisfaction.

The defendant, for plea, says that, before the commencement of this action, he paid to the plaintiff five hundred dollars (or, he delivered

55 Milliken *v.* Brown, 1 Rawle, 391; Keen *v.* Vaughan, 48 Pa. St. 477.

56 Brooks *v.* White, 2 Metc. 283; 2 Pars. Cont. 619.

57. Ware *v.* Street, 2 Head, 609; Kirtland *v.* M. & T. R. R., 4 Lea, 421; Scruggs *v.* Gass, 8 Yerg. 175.

58. 1 Chit. Pl. 584.

59. 2 Greenl. Ev., § 516.

... the plaintiff one Jersey bull), and the same was accepted by him, in full satisfaction of his damages sustained by reason of the breach of the contract (or, by reason of the wrongs) mentioned in the declaration.

Accord and satisfaction as a defense to actions for the recovery of debts means, that the parties have come to another agreement in substitution of the one upon which the plaintiff sues, and that the substituted agreement has been executed, but in actions for the recovery of unliquidated damages, as in the case of tort, it means, that the parties have made an agreement where none before had existed, and that that agreement has been executed. The mere agreement or accord does not discharge or extinguish the original claim, but to constitute a good defense, *satisfaction* of the agreement must be pleaded The defense is not accord, but accord *and* satisfaction, and so in the proof it must be made to appear that the accord has been carried out according to the intention of the parties [60] Satisfaction would ordinarily mean the payment of the money or delivery of the property under the new contract, but the execution and delivery of the defendant's note will be held satisfaction, if such was the intention of the parties, *though the note be never paid* [61] In a joint action against two or more wrongdoers, accord with one is a release of all.[62]

To the plea of accord and satisfaction, the plaintiff may reply, specially denying the accord or the satisfaction; or he may use the general replication, Form No. 2, and thereby put the whole plea in issue.

§ 19 If a party has been sued about any matter, and the cause has been tried on its merits, and he be a second

60 Jones *v.* Peet, 1 Swan, 293, Cumber *v* Wain, 1 Smith Lead. Cas 146, and note, James *v* David, 6 Heisk 1 5 T R 140

61 Foster *v* Collins, 6 Heisk 1 2 Pars Cont 6[illegible] note

62 Brown *v.* Kencheloe, 3 Coldw. 192.

time sued about the same matter, he may plead the former judgment as a good defense, thus:

No. 29. Former Judgment.

The defendant, for plea, says that the plaintiff sued the defendant in the Circuit Court of Wilson county, on the 1st day of April, 1887, for the very same cause of action now stated in his declaration, and at the September term of said court said suit was tried upon its merits, and judgment was rendered in favor of the defendant (or, in favor of the plaintiff) for two thousand dollars and costs (or, for said land and two hundred dollars damages), as by the record and proceedings of said court more fully appears. And said judgment still remains unreversed.

REPLICATION.

The plaintiff may reply, denying the existence of such a record, thus:

No. 30. Replication: Nul Tiel Record.

The plaintiff, for replication, says there is no such record in the Circuit Court of Wilson county, as the defendant alleges in his plea

Or, he may deny that the cause of action is the same, thus:

No. 31. Replication: Not Same Cause of Action.

The plaintiff replies that the cause of action for which the suit mentioned in the plea was brought and judgment rendered was not the same, either wholly or partially, as that for which the plaintiff now sues.

The issue under Form No. 30 is to be tried by the court Nothing but an inspection of the original record, if in the same court, or a certified copy, if in a different court, is necessary to decide it.

No. 31 makes an issue to be tried by a jury.[63] It is proper where the plaintiff means to contend that, in the original action, what he now sues for, was not involved.

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63 Hill *v.* State, 2 Yerg 249, Ridley *v.* Buchanan, 2 Swan, 555; Coffee *v* Neely, 2 Heisk 304

§ 20. If two or more persons commit a trespass, and judgment be obtained against one, and *satisfaction* thereof be had, this may be pleaded as a good defense to an action brought against the others Form No 29 can be easily changed so that its statements will be appropriate to such a case. One essential statement of such a plea is wanting in Form No. 29, and that is the fact *that the former judgment has been satisfied,* for without this it would be no bar to a suit against the other trespassers.[64] Indeed, this is not so much a defense of former judgment as it is of *satisfaction* of the plaintiff's demand.

In order that the defense of former judgment may be good it must appear, not only in the averments of the plea, but in the proof, that the cause of action in the suit in which the defense is made, and that in the former suit are the same. Ordinarily, this can be determined by reference to the pleadings. But there may be no written pleadings, as in suits before justices of the peace, or the judgment even in a court of record may be general and uncertain, and in such cases parol evidence is admissible to show the fact or issue involved in and settled by the former judgment.[65]

If the former suit was determined upon a collateral matter or issue, as that the debt was not due, or that the suit was brought in the wrong county or in the wrong court, or the like, and for such cause the suit was dismissed, the judgment would not be a bar to a recovery upon the merits in another action.[66] But there are other matters, in a certain sense collateral to the main question, which may arise in the trial of a cause, and which must be determined in the judgment of the court, the effect of

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64. Knott *v* Cunningham, 2 Sneed, 205, Brown *v* Kencheloe, *supra*

65 Estell *v* Paul, 2 Yerg 467, Warwick *v.* Underwood, 3 Head, 239.

66 Estell *v* Paul, *supra.*

which, under this defense, is not so clearly settled. Thus, let it be supposed that issue is formed upon the plea *molliter manus imposuit* (Form No. 15), and the main controversy in the proof is upon the question whether the horse mentioned in that plea is the property of the defendant,[67] and that the issue on the plea is found in favor of the defendant Could the judgment in such case be pleaded in bar of another suit brought by the plaintiff against the defendant for the recovery of the horse? And if to trespass *quare clausum* the defense is *liberum tenementum*, with judgment for the defendant, will this bar a subsequent suit in ejectment by the plaintiff for the recovery of the land? Neither of these questions has been definitely settled by the decisions of the courts[68] In Tennessee, perhaps, both questions would be answered in the affirmative.[69]

§ 21. In actions for the recovery of damages for any injury done to property, real or personal, the defendant may plead specially in denial of the plaintiff's title to the property, thus:

No. 32. Plea: Denial of Property.

The defendant, for plea, says that the horses (goods, lands, etc), specified in the declaration are not the property of the plaintiff.

Under this plea the burden is on the plaintiff to show some such title or interest in the property as in law gives him a right to sue for an injury to it. It need not be the absolute title; it may be a limited or qualified interest, as if it be personal property, that of a bailee. On the other hand the defendant will be permitted in sup-

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67 The general replication to Plea No 15, *molliter manus imposuit*, puts in issue the defendant's title to the horse mentioned in the plea. The plaintiff may also deny the fact by special plea

68. See 2 Pars Cont 731, where the authorities which answer the question both ways are collated.

69. Warwick *v.* Underwood, 3 Head, 238.

port of his plea to show that the title is in himself or some third party, or directly that it is not in the plaintiff.

And so in such cases the defendant may specially plead that the property is in himself, which is indirectly, but in a more restricted form than the above plea, denying the title of the plaintiff. In the last form, as just stated, the defendant may disprove the plaintiff's title by either of three ways. (1) by direct proof that it is not in the plaintiff without more; (2) by showing that it is in himself, the defendant, and (3) by showing it to be in some third party. But where property in the defendant is pleaded it narrows the inquiry to that single question, the defendant becomes the actor, the burden is upon him to show the truth of his plea, and if he fails the plaintiff must recover. This plea, when the trespass was to lands, was at the common law called *liberum tenementum,* and its effect was to admit everything else, and raise only the question whether the land described was the defendant's *freehold* or not[70] Now, there can be no distinction, whether the wrong charged affects land or personalty. The defense of property in the defendant must amount to an admission of all title in the plaintiff, except that claimed to be in the defendant; and so the defendant, failing to show the truth of his plea, the judgment must be for the plaintiff.

Such a plea would be in the following form:

No. 33. Plea: Liberum Tenementum, or Property in Defendant.

The defendant, for plea, says the land (or, goods or horses), specified in the declaration, is his property.

§ 22. Where in an action on an unwritten contract an express contract is necessary to make the defendant

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70. 2 Greenl. Ev, § 626, Steph. Pl 317

liable, the declaration states the contract, the consideration, and the breach. If either is untrue, he cannot sustain his action. The defendant may therefore, by plea, specially deny either the contract, the consideration, or the breach. Thus the foregoing declaration on a marriage contract states a *mutual* contract to marry, which, "by a fair and natural construction," means that the promise of each was the consideration of the other's promise to marry Here, then, is the defendant's contract stated, and a sufficient consideration for it; and then his breach of it. He may deny his promise to marry her, or the consideration, her promise to marry him, or the breach, his refusal to marry her. So, if the contract was to build a house, the contract, the consideration, and the breach must be stated. The defendant would either deny by the general issue, or he would specially deny the contract, the consideration, or the breach by separate pleas. A denial of either alone admits the others A denial of a breach, however, if it is stated negatively, can only be by affirming a performance. For instance, if the breach alleged is he did not build the house, it is only to be denied by affirming that he did build it.

The following three forms illustrate respectively pleas denying (1) the contract, (2) the consideration, (3) the breach:

A B
v
C D

No. 34. Plea: Denial of the Contract.

The defendant, for plea, says that he did not agree to build a house for the plaintiff, as he has declared.

No. 35. Plea: Denial of Consideration.

The defendant says the plaintiff did not give him one thousand dollars, or any other sum (or, twenty bales of cotton, or whatever else is stated as the consideration advanced), to build a house for him, as alleged in the declaration.

No. 36. Plea: Denial of Breach.

The defendant says that he did build the house for the plaintiff according to his agreement, as stated in the declaration

§ 23. Where no express contract is necessary to charge the defendant, but the law implies one from certain facts, then usually the facts only will be stated, and how much was and is yet due or owing to the plaintiff on account of the facts. Thus, in a form of declaration for goods sold, etc., it is merely stated that so much was due for goods sold the defendant The further statement might have been made that the defendant promised to pay for the goods, but it would have been simply stating what the law implied And so a denial of the promise would not be a good special plea, it would be an immaterial issue Whether he promised or not, he is still bound to pay for the goods sold and delivered. He must specially deny the facts alleged. If they are true, if he actually did buy the goods, the law implies a promise to pay for them.

In the declaration for goods sold and delivered to the defendant, it is not said, *at his request,* because, in the very act of buying, his promise to pay is given But as to work done or money paid for him, his request is necessary to raise an implied promise, and if that is not stated, it must be alleged that he promised to pay But the two facts, the request and the doing of the work, are sufficient to charge him without any promise, and they being both stated, the denial of a promise, if alleged, would be a bad plea. He must deny the request, or the doing of the work, or the paying of the money But if the request is not stated, then the promise to pay is essential, and may be denied by plea.

If in an action for goods sold, etc , the defendant wishes to deny the purchase, the plea would be as follows

No. 37. Plea: Denying that Defendant Bought Goods.

The defendant, for plea, says the plaintiff did not sell and deliver to him any goods as alleged in the declaration.

§ 24. If the action is for work done, or money paid for the defendant, and the declaration alleges that the work was done or the money was paid at the *request* of the defendant, the plea may deny either the thing alleged to have been done, or the request, thus.

No. 38. Plea: Denying Work or Payment of Money.

The defendant, for plea, says the plaintiff did not do any work for him (or, pay any money for him), as alleged in the declaration.

No. 39. Plea: Denying the Request.

The defendant, for plea, says he did not request the plaintiff to do the work (or, pay the money) for him, as alleged in the declaration

If the declaration alleges both a *request* to do the work and a *promise* to pay for it, *both* must be denied disjunctively thus.

No. 40. Plea: Denial of Request and Promise.

The defendant, for plea, says he did not request the plaintiff to do the work mentioned in the declaration, or promise to pay him for it

A denial of the *request* only, or of the *promise* only, would be a bad plea. A denial of either *alone* admits the other, and either being true, the plaintiff would be entitled to recover, and so *both* must be denied.

CHAPTER VIII.

PREPARATION FOR TRIAL.

§ 1. It may be of some benefit to the student before entering strictly upon the discussion of the subject of this chapter to refer briefly to the manner of changing the venue

The venue may be changed, that is, the suit may be transferred for trial to another county, at any time after issue joined and before the trial. Issue must be joined first, because it cannot be known whether it is to be an issue of law to be tried by the court, or an issue of fact to be tried by a jury. And it is only in the latter case that the venue can be changed.[1] There is one exception made in Tennessee which provides that when the judge is interested in the cause, or for any reason incompetent, he shall, at the request of either party, transfer it to any court in an adjoining circuit which has jurisdiction of such case. Whether it is an issue of law or fact can make no difference in such a case.[2]

But in cases not falling within this exception, the law in Tennessee provides that the party applying for a change of venue shall "make a *statement of facts* in writing, under oath, that he verily believes that, owing to prejudice, or other causes then existing, he cannot have a fair and impartial trial in the county."

By the natural construction of this law, an existing prejudice is made a fact, and when properly established in the proof, it is a sufficient reason for changing the venue. The law does not seem to require that the *party* shall show in *his* affidavit upon what the prejudice is

1. § 3542, M. & V 2. §§ 4685, 4686, M & V.

founded, or any reason for its existence. If this be the true construction of the law, then the following affidavit by the party will be sufficient:[3]

Affidavit.

A B }
v }
C D }

The plaintiff makes oath that he verily believes there now exists against him in Wilson county such a prejudice that he cannot have a fair and impartial trial of this cause in said county A B
Sworn to and subscribed before me, April 1, 1887
E F,
Clerk

But the law above referred to further provides that this statement by the party shall be verified and supported by the oath of at least three respectable and disinterested persons. It would seem to be required that these three disinterested persons should do something more than merely sign and swear to the above affidavit. They are called by the law to establish the existence of a fact, and they should be examined as other witnesses touching their knowledge and opportunity for knowing the fact. The party in his affidavit has laid the ground for a change of venue by the statement of a fact, but the law says the existence of that fact shall be established by the testimony of three disinterested witnesses, which means testimony given upon examination in open court or by depositions to be read to the court, and this has been expressly held to be the correct practice in such cases.[4]

The change of venue is a judicial act to be performed in the mode pointed out by the law and in no other mode. The record should show not only who made the application for the change, and that it was supported by at least three respectable and disinterested witnesses, but that in the opinion of the court the cause for the change was good, that its existence was made evident in the proof, and that

3 § 3544, M & V 4 Weakly v Pearce, 5 Heisk 422

the change of the venue was ordered because it appeared to the court that the party asking for it could not have a fair and impartial trial in the county where the case was then pending.[5]

It may be that the prejudice is not against the plaintiff or defendant personally, but against his title or cause. Then it should be so stated. It may be neither, but a deep and extensive sympathy with the other party. Whatever it is, it must be stated and proved as above indicated.

This application may, by consent in writing of the other party, be made to the judge in vacation, otherwise, it must be made during the term.[6] If the judge is satisfied of the truth and goodness of the cause stated, he orders the change.

The cause is to be transferred to the nearest adjoining county free from the like exception, whether in the same or another circuit.[7] The judge will ascertain by any evidence that may be satisfactory to him what adjoining county is free from or subject to the like exceptions

The clerk is to copy from his minutes all the orders in the cause, and, among others, the order for a change of venue, and certify it to be a full and true copy, and envelop the transcript with the original papers, and deliver or send them "by messenger" to the clerk of the court to which the venue is changed.[8]

There may be other changes of the venue by the same party, after the first, but it can only be for causes not in existence when the first change was made.[9]

Statutory regulations for changing the venue exist in all the States, differing in detail it may be, but in substance agreeing with the proceeding as above given.

§ 2. Supposing the question of venue to be settled, the

5 Weakly *v* Pearce, 5 Heisk 422; Roller *v* Roller, 8 Baxt 207, Livingston *v.* Noe, 1 Lea, 56, Sells *v* King, 11 Heisk 399
6. § 3547, M & V 7. § 3544, M. & V.
8 § 3550, M & V., Walker *v* Snowden, 1 Swan, 192.
9 § 3543, M & V.

next thing to be done after issue joined is to prepare for trial When an issue of fact is formed it stands for trial at the next term, and the preparation for that trial consists in procuring the evidence which each party may deem necessary to sustain his side of the issue.

The parties procure no evidence until they know what facts are to be controverted; if they do, it is at their own cost.[10] For aught either of them can tell, until they have consummated their pleadings, the result may be an issue of law to be disposed of at once by the court. Facts may be admitted in the course of their pleadings which will relieve them from the adduction of a vast amount of testimony that would otherwise have been necessary to illustrate the merits of the case.

The evidence on the trial will consist either of documents or the testimony of living witnesses. The latter is more naturally to be first considered. The testimony of living witnesses may be obtained in either of two ways, first, by requiring their personal attendance and *viva voce* examination in open court, and, second, by taking their depositions to be read on the trial.

The personal attendance of witnesses is procured by the use of a summons commonly called a *subpœna* The clerk is bound to issue it at any time, at the request of either party, and to any county in the State. The style, address, and teste, are the same as those of the original summons It is a writ, or process, and the same constitutional requirement applies to it. The difference is in the command: the summons in the original process was to *answer;* in this it is to *testify* It is in this form:

THE STATE OF TENNESSEE

To the Sheriff of Wilson County:

Summon A B. to appear before the Circuit Court of Wilson county, at the courthouse in Lebanon, on the third Monday in September

10. There are exceptional cases where the testimony of witnesses may be obtained before issue that will be noticed hereafter.

next, to give evidence in behalf of the plaintiff in a suit pending in said court, between John Smith, plaintiff, and James Hart, defendant. Witness my hand, this second Monday in May, 1887

S G STRATTON,
Clerk.

It was usual to add after the words, "Hart, defendant," "under the penalty of one hundred and twenty-five dollars;" but it is useless. The law prescribes the penalty, and he is bound to know it. It was from these words, however, that the writ took its name, *sub pœna*, under the penalty. It is to be delivered to the sheriff, and by him executed and returned to the first day of the term, as other writs. When issued in vacation, if the sheriff cannot find the witness, he may leave a copy at his usual place of residence, and that will be a valid service.[11]

The witness is bound to attend at the term to which he is summoned; and if the cause is continued he is still bound to attend, without any new summons, "until discharged by the court or the party who had him summoned."[12] At common law he had to be resummoned when the cause was continued.[13] He need not be formally discharged; a final decision discharges him A verdict or nonsuit discharges him, and if the nonsuit is set aside, or a new trial given, he is to be resummoned.[14]

For nonattendance as long as he is bound to attend, he forfeits one hundred and twenty-five dollars to the party who summoned him The judgment for the forfeiture is taken thus: The witness is first called, if he fails to come the attorney directs the sheriff to make this public announcement:

O yes! O yes! Come into court and give evidence in behalf of John Smith, plaintiff, in his suit pending in this court against James Hart, defendant, or the plaintiff will take judgment against you for the forfeiture of one hundred and twenty-five dollars

11 § 4570, M & V
12 § 4573, M & V, Slaughter *v.* Birdwell, 1 Head, 343.
13. 1 Greenl Ev, § 307
14. Cochran *v* Brown, 1 Humphr. 329.

A judgment *nisi* (unless), is then rendered, thus:

John Smith
v
A B, Witness.

Forfeiture on Subpœna.

On motion of the plaintiff, the defendant being solemnly called to come into court and give evidence in behalf of the plaintiff in his suit pending in this court against James Hart, defendant, came not, but made default; and it further appearing that a subpœna was issued from this court, at the request of the plaintiff, on the 1st day of July, 1887, commanding the sheriff of Wilson county to summon the defendant to appear before this court on the third Monday in September then next ensuing, to give evidence in behalf of the plaintiff in said cause, and it further appearing that the subpœna was duly executed by the sheriff on the 1st day of August, 1887, it is therefore adjudged by the court that the plaintiff recover of A B, the defendant, one hundred and twenty-five dollars, the forfeiture allowed by law, and also the costs of this proceeding, unless he appear hereafter and show cause to the contrary [15]

The witness may at the same term appear and move to set aside the judgment on showing good cause for his non-attendance But if he fails to do so, the plaintiff may have a *scire facias* issued against him, which may be in the following form:

STATE OF TENNESSEE — WILSON COUNTY.

To the Sheriff of said County

You are hereby commanded in the name of the State to notify that a conditional judgment was rendered against him on the day of , 1903, in the Circuit Court of Wilson county, for the sum of $ and costs on a forfeiture of subpœna, and the same will be made final unless he appear at the next term of said court and show cause to the contrary

Witness my hand at office, this first Monday in September, 1903

S G STRATTON,
Clerk

This simple and brief form of the *scire facias* is allowed by statute in Tennessee, and is a great improvement upon that formerly required under the law of that State The form, which is given in the act (1897, chap. 47) does not give the date of the judgment *nisi*, and is without teste These have been included in the above form, which would,

15 Dickenson *v.* Kincaid, 11 Humphr 72; Knott *v.* Smith, 2 Sneed, 245

however, be good without them by virtue of the express provisions of the statute.

The date of issuance, the delivery to the sheriff, the service by reading it to the defendant, and the return of what he has done, are all under the same regulation as other civil processes.

If it is returned that the defendant is not to be found, the practice has been to issue an *alias,* and if that too was returned not found, the same proceeding might be had as if it had been returned executed.[16] In such case, there is said to be two *nihils,* which are equivalent to actual service of a *scire facias* The Code of Tennessee says that, if, "upon the return of the *scire facias,*" he does not show sufficient cause for his failure to attend, judgment on motion shall be rendered against him.[17] Probably the qualification is to be understood, upon its return executed, or two *nihils*

When the witness appears under the *scire facias,* he may make his defense the same as to a declaration, by demurrer or plea [18] Or the defense may be made by motion, and decided in a summary way, without pleading or a trial of disputed facts by a jury [19]

If he fails to appear, judgment by default is taken by calling him, as in other cases, thus:

O yes! O yes! Come into court and answer the *scire facias* issued against you by John Smith, or judgment final will be taken against you by default

The entry of final judgment may be thus:

John Smith } **Judgment on Scire Facias.**
v
A B }

On motion of the plaintiff, the defendant being solemnly called to come into court and answer the *scire facias,* failed to do so It is therefore considered by the court that the plaintiff finally recover

16 State *v* Dozier, 1 Tenn 223 17 § 4576, M. & V.
18 Dickenson *v* Kincaid, 11 Humphr. 72.
19. Duke *v* Given, 4 Yerg. 478.

of the defendant the forfeiture of one hundred and twenty-five dollars, mentioned in the *scire facias*, and also the costs

§ 3. If the party wants the witness to bring with him any papers to be used as evidence, he adds a clause to that effect to the summons. After the words, "Hart, defendant," say, "and to bring with him (*duces tecum*) a certain deed of conveyance from A. to B. for one hundred acres of land," etc, describing the instrument sufficiently to identify it.[20] The witness cannot, however, be thus compelled to produce his own private papers, or those of his client, if he be an attorney.

§ 4. If the witness willfully fails to attend, it is a contempt of court, and the party may have an attachment forthwith to bring him in, without any previous rule on him to show cause. It commands the sheriff to take his body and bring him into court to give evidence, etc, as in the subpœna. The court must have satisfactory evidence of the willfulness of his absence, usually the affidavit of the party, to warrant an attachment [21]

If the witness is in jail, or in custody, or in the military or naval service, the party can only obtain his attendance by a petition to the judge sworn to, and a *habeas corpus* thereon directed to the officer having him in custody, to produce him on the trial to give evidence.[22] If he is in the jail in the same town where he is wanted, the court usually orders the sheriff to bring him in, without any formal petition or *habeas corpus*.

As an additional security for the witness' attendance, he is liable to the party, not only for the forfeiture of one hundred and twenty-five dollars, given by statute, but also for whatever damages he may sustain by reason of his failure. Whenever one is bound to perform a service for another, he is liable for any injury that may result as a

20 1 Greenl. Ev, § 309
21. 1 Greenl Ev, § 319; §§ 4881, 4882, M & V.
22 1 Greenl Ev, § 312.

necessary or natural consequence from the nonperformance of it.[23]

It is generally laid down in the books that a witness is not bound to attend unless the party tenders him in advance his reasonable expenses.[24] But the statutes require him to attend when summoned. His compensation is regulated by law, and he is entitled to nothing until he performs the service.[25]

§ 5. The second mode of procuring a witness' testimony is by taking his deposition. Here the witness does not appear in court. His evidence is written and read. There are many tests of credibility that cannot be applied — the look, the manner, the minute detail, are wanting. Hence the evidence is not so satisfactory, and at common law was not allowed in regular practice, though parties were sometimes compelled by the courts to allow their adversaries to take deposition, in order to obtain continuances, new trials, and other advantages which were in some degree dependent on the discretion of the court.[26] It has always been the regular mode of introducing the testimony of witnesses in the Chancery Court, and it has long been allowed by statute in civil actions in the courts of law.

Ordinarily, it would be useless to take the testimony of witnesses before the suit is commenced, and before it has been ascertained by the pleadings what facts are going to be controverted, and it has been stated as the general rule that it cannot be legally done.[27] But there are certain important exceptions to this general rule, which will now be noticed.

Under certain circumstances, the testimony of living witnesses may be taken, *before suit is commenced.* Thus, if litigation is *anticipated* about any matter, the testimony

23. § 4574, M & V
24. 1 Greenl. Ev., § 310
25. Smith *v* Barger, 9 Yerg 321, Witherspoon *v* Killough, Mart. & Y 39, Carren *v.* Breed, 2 Coldw. 465.
26. 1 Greenl Ev, § 320
27. Morrow *v.* Hatfield, 6 Humphr. 108

of the witness may be taken, and thus perpetuated. Suits may be purposely delayed until witnesses to the facts have died or disappeared, or it may be easy to see that a suit will be necessary at some distant day, where no right of action now exists; and so, in either case, it may be important for a party in interest to put the testimony of living witnesses in permanent form, so that it can be used when needed. In one case, this may be done in Tennessee simply upon notice to the party adversely interested, and that is, where it is desired to take the deposition of a notary public as to any of his official transactions[28] If the opposite party resides in the State, he must have ten days' actual notice, and if he is a nonresident, he is entitled to forty days' notice, either actual or by publication. By "opposite party" is meant any one who may have an interest in the matter of such character that he may become an opposite party in a suit about it, as if he be an indorser upon a note which the notary has protested for nonpayment, and given him notice of the fact. Here, if the indorsee wishes to perpetuate the testimony of the notary, the indorser would be the "opposite party" upon whom notice must be served.

In all other cases of obtaining testimony *before suit commenced,* it must be done upon application to some judge or chancellor. The mode of procedure is as follows: The party desiring it presents a petition to the judge, stating the subject-matter of controversy, the names of the parties interested, and of the witnesses, and the reasons why he wants their depositions. The judge thereupon appoints a time and place for the opposite party to appear, and directs what notice shall be given him. If he is a

28 §§ 2476, 4647, M. & V It is not said in the Code cited what disposition for safe-keeping shall be made of the notary's deposition when taken, but it is supposed the correct practice would be to have it transmitted by the commissioner to the register for registration, as provided in cases where the testimony is obtained on petition, instead of notice

nonresident, he may direct notice to be given him in the newspapers, or in any other manner. If no good reason is shown to the contrary at the appointed time and place, the depositions will be taken by the judge or his appointee, sealed up and directed to the register of such county as the judge may appoint; and if he appoints none, to the register of the petitioner's county; or, if he is a nonresident, to the register of the county of the opposite party. The register is to register the whole proceedings. Copies certified by him are to be evidence in any suit that may subsequently arise between the parties or their privies, if the witnesses are then dead, insane, or gone to some unknown place.[29]

Evidence obtained in either of the above-mentioned ways is said to be taken *de bene esse*, that is, in anticipation of the occasion when it may be needed. The evidence is looked upon as a temporary and conditional examination, to be used only in case the witness cannot afterward be examined in the suit in the regular way, as if, at the trial, the witness be dead, insane, or removed to some place unknown.

§ 6. The testimony of witnesses may be taken by deposition, upon giving the usual notice, or upon such notice as the court may order, after suit is commenced, and *before issue is joined*, in the following cases:[30]

1. Where the witness is incapable of attending the trial, either from age, bodily infirmity, or other cause.

2. When he is under the necessity of leaving the State before the cause is tried.

3. When he is about to leave the county in which the suit is pending, and will probably not return until after the trial.

4 When he is the only witness to a material fact.

And, of course, in all these cases, the depositions may be taken *after issue is joined*, upon notice.

29. §§ 4634–4646, M & V. 30 §§ 4589, 4592, M & V

If the testimony is not taken for the purpose of having it *perpetuated,* or upon one of the four grounds last above stated, then it must in all cases be taken *after* issue joined.

§ 7. There does not seem to be any limitation to the right of a party to take depositions after the issue of fact is made up. Indeed, the policy of the law is to require him to do so, in respect to a large class of witnesses, by exempting them from the penalties provided for nonattendance if, when the *subpœna* is served upon them, they claim exemption from attendance, stating the reason therefor, or afterward do so upon an application to the court for release.[31] To this class of persons belong officers of the United States, of the State, of any county in the State, the clerk of any court of record other than that in which the suit is pending, members of the legislature while in session, or the clerk thereof, a practicing physician or attorney, and a jailer or keeper of a public prison in any county other than that in which the suit is pending. In the case of female witnesses, the law is emphatic in exempting them from attendance in court, and without requiring them to assign cause therefor, and they cannot be compelled to come before the court, unless upon sufficient cause shown the court shall make an order to that effect.[32]

§ 8. If the witness whose deposition is taken resides in the county where suit is pending, the adverse party may have him summoned, *and if he is present under the summons* his deposition cannot be read, but he must be examined *viva voce.*[33]

Either party may take the deposition of any person who resides in the county; but, in this case, the other party may have him summoned, and then he must be examined

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31. § 4593, M & V

32. § 4590, M & V

33. § 4591, M & V, Puryear *v.* Reeves, 6 Coldw 27. That the witness "happened" to be present, is not enough to prevent the reading of his deposition He must be present *as a witness, under summons.* Turney *v.* Officer, 3 Head, 567.

as if summoned by the party who took his deposition, that is, his deposition cannot be read.

If he resides in another county, the adverse party may have him summoned likewise, if he wants him examined in court, but that does not preclude the reading of his deposition by the party who took it. It simply enables the party who summoned him to examine him if he chooses.[34] So the nonresident, if found in the State, or any person whose deposition is taken, may be summoned by the adverse party, and be compelled to attend and be examined, unless exempt by law. But, though the witness does attend, the party who took the deposition may read it, except where the witness resides in the county.

§ 9. Depositions may be taken before any judge, justice of the peace, mayor, or chief magistrate of a town, the clerk of any court, notary public, or before any person properly commissioned or appointed by the court or clerk who is not interested, or of counsel in the cause, or related to either of the parties within the sixth degree, computing by the civil law.[35] And it has been decided in Tennessee that any judge, justice of the peace, or other judicial functionary in another State who is competent there to administer an oath, is legally competent to take depositions to be read as evidence in the trial of causes in Tennessee,[36] and by express statutory enactment in the latter State, depositions may be taken before notaries public of other States,[37] or before a commissioner of the State, duly appointed and commissioned by the governor.[38]

If the deposition is taken in another State, or in this, it is to be presumed that the commissioner sustains the office or character indicated in the caption or certificate to

34. Ford *v* Ford, 11 Humphr. 90, Sweet *v* Rogers, 6 Heisk 122, § 4596, M. & V
35 § 4622, M & V
36 Hoover *v* Rawlings, 1 Sneed, 287.
37. Shan Code, § 3195*a*.
38. § 219, M. & V.

the deposition.[39] Any officer or other person who takes a deposition is called the commissioner, because formerly no one could take a deposition unless authorized by a written commission from the court, called a *dedimus potestatem.*

§ 10. Depositions may be taken in two ways: 1. Upon interrogatories. 2. Upon notice given to the adverse party. There are four cases in which the first mode (by interrogatories) may be resorted to:

1. Where the witnesses reside out of the State.
2. Where they reside over one hundred and fifty miles from the place of trial.
3 Where the opposite party is a nonresident.
4. Where the defendant has suffered judgment by default or *pro confesso* for failing to appear and make defense.

In the first and second cases, the party wishing to take the depositions prepares the interrogatories or questions which he wishes the witnesses to answer, and files them with the clerk of the court in which the suit is pending, giving the opposite party, if he be a resident of the State. notice that they are so filed. It is also the duty of the clerk to give a like notice to the attorney of the opposite party if there be one resident in the State. Upon such notices being given, the opposite party shall have ten days thereafter in which to prepare and file with the clerk cross-interrogatories, and to these, rebutting interrogatories may be filed by the first party And at any time thereafter the depositions may be taken upon certified copy of the interrogatories issued by the clerk.

In the third and fourth cases the interrogatories are to be prepared, with a memorandum of the time and place of taking the deposition, and filed in the same way as in the

39. 1 Sneed, 287 The effect of this decision in the case last cited is to render unnecessary the issuance of a commission by the court or clerk in any case, and to allow depositions to be taken in all cases upon notice to the adverse party, and if he be a nonresident, notice to his attorney. §§ 4601, 4609, M & V.

first and second cases. But here no notice to the opposite party is required It is only necessary that the interrogatories remain in the clerk's office for *twenty days* before taking the deposition, and after that period the party may proceed as in the other cases. If any notice is necessary it is to be given by the clerk to the attorney of the opposite party if he have one resident in the State.[40]

The other mode by which depositions may be and usually are taken is by notice which will now be considered. The notice must be given to the opposite party in all cases, unless he be a nonresident, and then it may be given to his attorney. If there are more parties than one, notice must be given to all of them, unless the court or clerk make an order, which either may do, directing the notice to be served upon some one or more of them.[41]

The form of the notice may be as follows:

To A B

You are hereby notified that I will, on the 12th day of January, 1887, at the residence of C D, in Wilson county, Tennessee, commence, and continue taking from day to day until completed,[42] the depositions of the following named persons, to wit, G, H, and K, and that I will offer to read said depositions as evidence on the trial of the suit pending in the Circuit Court of Wilson county, Tennessee, wherein I am plaintiff and you are defendant

This, January 1, 1887.

JOHN SMITH

This notice is not process, and any private person may serve it. But it may be served by an officer, and it is

40 §§ 4610, 4611, 4612, M. & V. The last section (4612) is not correctly brought forward from the original act, 1859, 1860, chap 53, into the M & V. Code The omission gives the section a broader meaning than can be given to the original act In stating in the text the law as to notice in taking depositions by interrogatories the original act, and not section 4612, has been looked to This section in M & V Code also differs from the like section in T & S Code

41. § 4604, M. & V ; Thompson *v* Commercial Bank, 3 Coldw 51

42. Brandon *v* Mullenix, 11 Heisk. 446 This case, contrary to the uniform practice, decides that if the commissioner fails to finish the depositions on the day named in the notice, he cannot continue the work on the succeeding day unless the notice on its face provides for doing so The form of notice given in the text is made to conform to this decision.

better to deliver it to the sheriff or some constable for service, as his return on it is sufficient evidence of the fact, whereas a private person would have to prove the service. The notice is always written in duplicate, and the officer leaves one copy with the party to whom it is addressed, and returns the other with his indorsement, showing the date of service to the party from whom he received it, or to his attorney, or to the commissioner before whom the depositions are to be taken. The executed notice should be produced at the time the depositions are taken that the commissioner may know he is proceeding according to law. The simple presence of the opposite party at the time and place of taking the depositions is not a waiver of his right to notice; but, on the other hand, it seems to be the law that if he is present in person or by agent or attorney, and *cross-examines* the witness, it would be a waiver of notice [43]

The object of the notice is of course to give the party an opportunity to be present and cross-examine the witness, and so the law has regulated the length of time to be allowed with that end in view.

If the deposition is to be taken in the county in which the suit is pending, the notice is to be served five days before it is taken. If to be taken out of the county, it depends upon the distance — from the courthouse of the county in which it is pending. If not over fifty miles, five days; from fifty to one hundred, ten days; over one hundred and not over two hundred and fifty, fifteen days; over two hundred and fifty and not over five hundred, twenty days; west of the Rocky Mountains in the United States, such time not over forty days as the court or clerk shall order; in foreign countries, such time as the court or clerk shall order [44]

In the computation of time the first day is excluded, and the last included. This is the rule in all cases where

43. Bedford *v.* Ingraham, 5 Hay, 156.
44. §§ 4605–4607, M & V

the time within which any act provided by law is to be done, unless the last day is Sunday, and then it too is excluded.[45]

According to this rule, if the deposition were to be taken on Monday, and five days' notice given, the preceding Wednesday would be the last day for the service of notice

§ 11. The commissioner appointed, or applied to to act as such, may issue subpœnas for the witnesses, returnable before himself, to be served by the sheriff or any constable. If they fail to attend, he may enforce their attendance by attachment. The forfeiture for nonattendance can only be enforced by the court in which the suit is pending For this purpose the subpœna is filed in court The return of the sheriff or constable on it is evidence of its service, and the certificate of the commissioner is evidence of the failure of the witness to attend. Upon this the court, on motion of the party, orders the issuance of a *scire facias,* which proceeds to judgment for or against the witness as in other cases[46]

The commissioner has all the powers of a court in conducting the examination. He can preserve order, compel the witness to testify, and control the conduct of the parties in the examination[47] The penalties he may inflict are, fine not exceeding ten dollars, and imprisonment not exceeding ten days, or until the witness testifies, if the contempt is his refusal to do so.[48]

§ 12. The commissioner, having sworn the witness, should require the questions to be reduced to writing before being put and read to the witness, and should take down the same in writing, or cause the same to be done by the witness himself, as near as may be in the witness' own words. The rule, however, requiring the questions to be written is not imperative. It is the answers of the

45. § 46, M. & V., Elder *v* Bradley, 2 Sneed, 248
46 §§ 4619–4621, M & V. 47. § 4614, M & V.
48. §§ 4882, 4883, M. & V

witness which constitute his deposition, and they may be elicited by verbal questions [49] When the deposition is completed, it should be signed by the witness.

§ 13. The caption and certificate are essential parts of a deposition in authentication of it [50] The caption should be substantially as follows:

A B
v
C D. } In the Circuit Court of Wilson County, Tennessee

Depositions of E and F., witnesses for the plaintiff (or, defendant) in the above case, taken upon notice (or, interrogatories) on the 12th day of January, 1888, at the house of G. H, in Smith county, Tennessee, in the presence of the plaintiff (and defendant, if such be the fact)

(Following the caption comes the questions and answers of the witnesses named in it.)

The form for the examination of a witness is thus

The said witness, E, aged about fifty years, being sworn, deposed as follows:

Question.
Answer

Cross-examination.

Question.
Answer

(Signature of Witness) E.

The testimony of each witness is usually concluded with this formula: "And further this deponent saith not," and then follows the signature of the witness.

The certificate of the commissioner should follow the last deposition, if more than one be taken, and it may be in this form:

The foregoing depositions were taken before me, as stated in the caption, and reduced to writing by me (or, by the witness) And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up, and delivered

49. Read *v.* Patterson, 11 Lea, 432; § 4615, M. & V.
50. § 4602, M. & V.

them to L. M (or, delivered them to the express office or put them in the post-office) without being out of my possession or altered after they were taken.

Given under my hand, this January 12, 1886.[51]

JOHN DEN,
Justice of the Peace of Smith County.

§ 14. When the depositions are thus completed, it is the duty of the commissioner to envelop and seal them with the notice and all papers deposed to, and address them to the clerk of the court where the cause is pending. He may deliver them to the clerk in person, or he may send them by mail, express, or private conveyance.[52] But if not delivered by the commissioner in person, he shall before he parts with them write his name across the seal of the envelope, or he may instead write on the sealed side of the envelope the last clause of the certificate beginning with the words "and that I sealed them up," etc.[53] When the depositions are received by the clerk, he shall certify upon them whether they were received by mail, express, or private conveyance, and if by private conveyance, he shall require the person delivering them to make oath that they have not been out of his possession, or opened by him, while in his possession.[54]

The clerk is to indorse upon the deposition the day it is filed, and enter upon a docket the style of the cause (A. B. *v* C. D.), the names of the witnesses, and the date of filing.[55] After they are filed, he may open them at the request of either party, or his attorney. Either has a right to know what they contain, that he may prepare

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51. § 4602, M & V A certificate which fails to state that the commissioner is not interested in the cause, nor of kin or counsel, is fatally defective. Carter *v.* Ewing, 1 Tenn. Ch. 212; Wilson *v.* Smith, 5 Yerg. 407.

52. § 4616, M & V

53. § 4617, M & V. If the depositions are delivered in person by the commissioner to the clerk, the indorsement on the envelope is not necessary. Hutson *v* Hutson, 9 Lea, 354.

54. §§ 4617, 4618, M. & V. 55 § 4625, M. & V.

additional or rebutting evidence. When the clerk opens a deposition, he should indorse that fact on it. And if either party demands a copy, he is to furnish it.[56]

§ 15. Objections to the reading of depositions used to be taken on the trial of the case. If the depositions were rejected, the parties had to try the case without the benefit of the evidence. The only remedy for the injustice that might be thus done, was a new trial; whereas, if the exception had been taken and sustained before, the party might have retaken the deposition, or supplied its place by other evidence. It is now provided that all exceptions to depositions for want of notice, because not filed in reasonable time, or for other causes going to the admissibility thereof, except objections to the competency of the witness or his evidence, shall be made and disposed of before the commencement of the hearing or trial, otherwise they will be considered as waived.[57]

It is the duty of the clerk to act upon the exceptions forthwith, and from his decision an appeal lies to the chancellor or judge, to be disposed of before the cause is heard or tried If the decision of the clerk is not appealed from, it is final, and if an appeal from his decision is not disposed of before trial, the objection to the deposition is considered waived [58]

Objections on account of the incompetency of the witness, or the inadmissibility of his evidence, are the only sort that can be taken on the trial

§ 16. "DOCUMENTARY EVIDENCE" is of two kinds, public and private. Among the first kind are all judicial

56 § 4628, M & V

57 §§ 4626–7, M & V

58 §§ 4626–7, M & V., Susong *v.* Ellis, 11 Heisk 85, 599, Darnell *v* Bullock, 7 Heisk 365 It is decided that the exception must be acted on by the clerk before the case is *called for trial* Hawkins *v.* McNamara, 1 Heisk. 353. Objecting to depositions, except for competency, must be specific, pointing out the ground. A general objection as to competency is sufficient. Whitely *v.* Davis, 1 Swan, 336, Gunn *v.* Mason, 2 Sneed, 637.

records and legislative enactments. They are to be found in the keeping of some public officer. No matter whether they belong to this or any other government, copies made by the officer in custody of them, properly authenticated, are evidence. Copies of legislative and executive acts published by the authority of the government to which they relate, are thereby sufficiently authenticated, and so they are, if made under the great seal of the government. Copies of the judicial records of a sister State, or of the Federal courts, are properly authenticated by the certificate of the clerk under his official seal, with the certificate of a judge, chief justice, or presiding magistrate, that the clerk's attestation is in due form.

The judicial records of foreign courts are proved by a copy certified in like manner by the clerk, or whatever other officer may have the legal custody of them, and the certificate of one of the judges or magistrates of the court, that such clerk or officer is the legal keeper of the record, and that the signature to his attestation is genuine, and a certificate under the great seal by the official keeper thereof, 1. That the court is duly constituted. 2 That it has jurisdiction of the subject, and that the seal of the court (affixed by the clerk, we suppose) is genuine (*a*)

A judicial record of a State, to be used in that State, is proved either by the production of the original, or a copy certified by the clerk, or whoever may have the legal custody thereof, under the seal of his office, if he have one. If there be no seal, he should certify that fact.

In Tennessee, the certificate of a justice of the peace of that or any other State to any judgment, and the preliminary proceedings before him, with the certificate of any clerk of his county that he is a justice, is sufficient evidence of those proceedings in any county in the State

(*a*) § 4550, M & V.; 1 Greenl. Ev., § 514

Any officer who has the custody of any record or writing is bound to give any person a certified copy thereof on demand and payment of the fees, and such copies are evidence in all cases. So the party has only to know what officer has the custody of a paper he wants, and procure from him a copy to be produced on the trial. And if he wants to prove the officer has no such paper, it is only necessary to get his certificate of the fact.

Official bonds, marriage licenses, the appointment of administrators, the qualification of executors, justice's proceedings, and innumerable other evidences, are thus obtained.

When the law authorizes the registration of writings, as deeds, etc., it is upon proof of their due execution before the clerk of the County Court, and it is his certificate of the probate that authorizes the register to register them, who not only registers the instrument, but the probate also. The instrument and probate, when produced with the register's certificate that he has registered both, or certified copies thereof if the original be lost, needs no other proof to make it admissible But this proof is *ex parte,* and the other party may, notwithstanding, prove that it is a forgery, or void

Official bonds are executed or acknowledged before the court or officer who takes them. The certificate of them by the proper officer is sufficient evidence of their genuineness. The clerk of the County Court is the proper repository of most of the bonds of county officers, guardians, administrators, and executors

The settlements of guardians, administrators, and executors are *prima facie* correct. But their correctness may be impugned.(*a*) And the same may be said of settlements made by authority of law in all cases; an officer or

(*a*) § 2886, M & V , Saunders *v.* Harris, 5 Humphr 345; Smith *v* Martin, 2 Tenn 209, Anderson *v.* Walker, Mart. & Y 201, Cook *v.* Hunter, 2 Tenn. 113.

legal commissioner being the general agent of the public.[59]

§ 17. To the second class of documentary evidence belong all written evidence of contracts and other private writings. Every written contract, instrument, or signature, purporting to be executed by the party sought to be charged, or his agent or partner, and constituting the foundation of an action or defense, and of which *profert* must be made, is conclusive evidence against such party, unless the execution thereof is denied on oath.[60] Writings which are not the foundation of the action or defense, or being so, are denied on oath, have to be proved by the subscribing witnesses, if any, unless they are dead, insane, or cannot be found If there are no subscribing witnesses, they may be proved by anybody; and the party who wants to introduce them must have them proved by depositions, or by witnesses in attendance at court.

§ 18 If it is desired to supply or use as evidence any lost record, it must be shown: 1. That such a record once existed 2 That it is lost. These facts may be made to appear by the affidavit of the official keeper of such record, or of some other person having knowledge of the facts, and then the contents of such record may be proved by any satisfactory evidence, which must be the best evidence the case admits of.[61] In Tennessee it has been held that the loss *must* be shown by the affidavit or evidence of the clerk or official keeper of the record, or satisfactory reasons given why it cannot be so done[62] Private writings not being of record may be supplied by the affidavit of any person

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59 See generally on the subject of the authentication of documents for use as evidence, §§ 4541–4558, and 4535, M & V, 1 Greenl Ev, §§ 479–515

60 §§ 4525, 4527, M & V

61. § 4666, M & V; 1 Greenl Ev, § 509, and § 84, note 2

62 Tyre v Magness, 1 Sneed, 278, Lane v Jones, 2 Coldw 218, Cornelius v Bank, 3 Tenn Ch 7; Pierce v. Bank, 1 Swan, 265, Rhea v. McCorkle, 11 Heisk 415.

acquainted with the facts, stating the contents thereof as near as may be, and that such instrument has been unintentionally lost, or mislaid, and that it is still the property of the person claiming under it, unpaid and unsatisfied. So, also, if the instrument is wrongfully in the possession of the opposite party, who fails to produce it on notice, it may be supplied on a like affidavit with the further statement of the wrongful possession and notice to produce.[63]

§ 19. An account on which action is brought coming from another county or another State with the affidavit of the plaintiff to its correctness, to be admissible as evidence, must be certified in one of three ways: 1. By a justice of the peace and the clerk's certificate that such justice is an acting justice in his county. 2. By a State commissioner. 3 By a notary public under his official seal. And when proved in either one of these modes, the account is conclusive evidence against the party sought to be charged, unless he shall on oath deny the same.[64]

The plaintiff's book, or a copy from it, unless the defendant gives him notice at the time of joining issue that the original must be produced, is evidence for him to the amount of seventy-five dollars for goods sold or work done, upon his making oath. 1. That it is a book account 2. That he has no means of proving it but by his own oath 3 The book contains a true account of all the dealings, or the last settlement of accounts between the parties 4 That it is a true account. 5. That he has given the defendant all just credits. An administrator or executor may adduce the book on swearing: 1. That he found it as produced 2. He believes it correct. 3 He knows of no other credits to be given. 4. He knows of no witness by whom it can be proved. The testimony of the plaintiff

63. §§ 4659, 4660, M & V.

64 § 4529, M & V, does not correctly state the law It entirely omits proof of an account before a justice of the peace of *another State* See §§ 3780, 3780*a*, T & S, and Shan. Code, § 5564.

may of course be contested. Such proof, however, in Tennessee, whether made by the creditor or his administrator, only covers items arising within two years before suit brought.[65]

§ 20. The law makes provision for the appointment of notaries public in every county. Their business is to present bills of exchange to the drawees for acceptance or payment, and to present negotiable notes to the makers for payment, and if they are not accepted or paid, to protest them under seal, and give notice to the drawer of the bill or to the indorsers of the bill or note, of non-acceptance or nonpayment. The notary's certificate in or on his protest that he did give notice, is sufficient evidence of the fact; or if he has entered the fact on his book of protests, and he be dead, the book or a sworn copy is evidence.[66] This is a much more convenient and less expensive mode of proving demand and notice in actions against drawers of bills and indorsers of notes than to rely on witnesses.

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65. § 4530, M. & V.

66. §§ 2470, 2472, M. & V.

CHAPTER IX.

TRIAL.

§ 1. The clerk keeps a trial docket, on which he enters the cases as they become ready for trial. They become ready by due course of law when an issue of fact is joined. The date of his entry on the pleadings, showing when they were filed, will show when issue was joined. If many are thus got ready at the same time, he is to enter that first on his trial docket in which the original process first issued If he has properly entered the cases on his appearance docket as soon as the writs issued, that docket will show which issued first, if there appear to be several issued on the same day. They may become ready by consent of parties, and whenever that happens, they are to be set down for trial.

They shall be tried in the order in which they stand on the docket, unless the parties in prior cases consent to give way to subsequent ones Thus, case No. 1 may permit No. 2 to be tried first, and then No. 1 may stand in the place of No. 2. But No. 1 cannot give No 3 its place without the consent of No. 2 also; for No. 3 may take two days to try it, whereas No. 1 may take only two hours, and No. 2 has a right to claim a trial whenever No. 1 is got out of its way by trial or otherwise No prior case can give its own priority of trial to a subsequent one, so as to displace intermediate ones from their priorities.

The court may order the clerk to apportion the cases on the docket for trial on particular days, but not so as to affect the priority to which the cases are entitled Still for reasons of public policy, the court has the power, without regard to their relative position, to fix days for the trial of cases in which the State is interested, as those

involving questions of revenue, the eligibility, qualification, appointment, or functions of public officers In all other cases, however, the order of succession on the docket must be preserved.[1]

§ 2. As the cases are reached on the docket, they must be tried, continued, or dismissed. If the plaintiff does not appear by himself or his attorney, or will do nothing with his case, it must be dismissed, which is done in the same mode that is pursued when he fails to declare or reply. If, however, the defendant fails to appear, the plaintiff may submit the issues to a jury for trial

To continue a case is to postpone the trial of it from one day to another of the same term, or to the next term, or a more remote term.[2] Any cause may be continued by consent of both parties or on sufficient cause shown by affidavit.[3] An affidavit is an oath reduced to writing,[4] and when it is used in support of a motion for a continuance, it must show three facts: 1. That the affiant is not ready for trial. 2 That it is not his fault that he is not ready. 3. That he expects to be ready at the time to which he asks a continuance. To say that he is not ready is not enough. He must show the reason why he is not ready, as the absence of a material witness, or a material document; failure to get a deposition; the unexpected absence of counsel whose presence is necessary to do him justice, and other facts.

At the first trial term the materiality of the absent witness may be stated in general terms, and it is called

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1. §§ 3655-3661, M & V, Memphis & O. R R Co *v* Dowd, 9 Heisk 185; Brocklin *v* Wolcott, 7 Heisk 743 In the two cases last cited it is held that § 3657, M. & V., which, with the exceptions stated in the text, requires the cases to be tried in the order docketed, is not imperative, but directory, and must yield to the exercise of the powers conferred on the court by §§ 423, 5009, M. & V, but yet that it is so far obligatory, that an arbitrary departure from it is error

2 Robertson *v* Netherton, 2 Tenn 326

3 § 3651, M & V

4. Grove *v* Campbell, 9 Yerg 10

a *general* affidavit. But if the continuance is asked at any subsequent term, the affidavit must specify what the witness is expected to prove, and is called a *special* affidavit. So if it is a deposition or a writing wanted, he may state at the first term that it is material to him, at the second he must show how it is material, by stating specially what fact he expects to establish by it. The court allows him to be his own judge of the materiality of the testimony at the first term, but after he has two whole vacations to prepare for trial, the facts must be disclosed so that the court may judge of its materiality [5]

So, the mere statement that it is not affiant's fault that he is not ready for trial is not sufficient. He must show a subpœna issued and delivered to the sheriff time enough to have had the witness summoned, notice given, or interrogatories filed, and the other necessary steps taken to procure depositions, or the requisite steps taken to procure documents. It will not do to rely upon the promise of witnesses to attend; he must employ the legal means to secure their attendance.

If he has not used due diligence to get the required evidence, he must give a valid reason for it The knowledge of the materiality of the witness or testimony may have been acquired too recently to procure it. His attorney's sickness or absence may have come too lately to his knowledge to have employed another, who could have investigated the case sufficiently to do him justice. In brief, the affidavit should in some satisfactory manner show the party without fault.

The last statement of the affidavit, that is, that affiant expects to be ready, etc., must appear, in view of the facts previously set forth in the affidavit to be reasonable, and to rest upon a legal possibility, for if the antecedent facts rebut such expectation, it would be useless to con-

5. Nelson v. State, 2 Swan, 482

tinue the case, as if it be shown that the *only* witness to a material fact is *dead*.[6]

It is not material by whom an affidavit for continuance is made, so that it satisfies the court.[7] It may be amended in the discretion of the court in any respect. Such is the practice now, though formerly in Tennessee the insertion of a new fact by amendment was not allowed.[8] The form of the affidavit for a *first* continuance may be as follows:

Continuance.

A B
v.
C D

The plaintiff makes oath that E F. is a material witness for him in the trial of this case. He has been summoned, but is absent without affiant's consent. He cannot go safely to trial without his evidence. He expects to have his attendance at the next term.

A B

Sworn to and subscribed before me in open court, 20th September, 1887.

S G STRATTON,
Clerk

If the motion is for a *second* or any subsequent continuance, then, after the words, "E F. is a material witness for him on the trial of this case," proceed as follows: "He expects to prove by said witness" (here set out what the witness will prove).

As to the propriety of receiving counter-affidavits, the Supreme Court of Tennessee has said, not, however, with reference to continuances, that it is a practice of doubtful and dangerous tendency, and to be more encouraged in the breach than in the observance.[9] Still, it cannot be said that there is any positive rule to exclude them in any case.

Continuances may be allowed by the court at any stage of the action upon good cause shown;[10] but the court, in

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6. 2 Tidd Pr. 773.
7. Guyer *v.* Cox, 1 Tenn. 184; 2 Tidd Pr. 772.
8. Lucas *v.* Sevier, 1 Tenn. 105.
9. Buchanan *v.* McManus, 3 Humphr. 449; Blackburn *v.* Hawthorne, 4 Coldw. 219.
10. § 5017, M. & V.

granting the application, may impose terms upon the party asking it, by making him pay costs, or otherwise, as may best further the progress of the cause and the ends of justice.[11] The theory of the law is, that continuances are in the sound discretion of the court.[12] It is the strict legal right of the parties to have the cause tried at the time appointed by law; and if one asks delay, he asks what deprives the other of a strict legal right; and the court may exact of him, as the condition upon which it will grant his request, that he shall yield to his adversary something which he is not in strict law entitled to, but which may be equally as necessary "to the ends of justice" He may be compelled to admit a deposition or document in evidence which ought to be, but cannot be admitted by the strict rules of law. He may be compelled to pay such part of the costs as the court may, under the circumstances, think just, although by strict law the costs are to abide the event of the suit. The court, however, will take care that the terms exacted are not such as will defeat the ends of justice.

§ 3. The parties being ready for trial, and the issue being one of fact, it was formerly triable by a jury, as, of course, unless by agreement, the matters, both of law and fact, were submitted to the court. This rule, as before stated, has been changed in Tennessee, and now, where the suit is commenced in any of the courts of record the right of trial by jury in civil cases is considered waived unless a jury is called for by the party desiring it in his first pleading tendering an issue triable by a jury, or by having an entry calling for a jury, made on the trial docket on the first day of any term at which the case shall stand for trial.

This is a new departure in the law on the subject of juries, which in recent years has rapidly grown in favor

11. § 3652, M & V
12. Rhea *v* State 10 Yerg 259, Wyatt *v.* Richmond, 4 Humphr 365, Womack *v* State, 6 Lea, 152.

The law of Tennessee does not provide any form for demanding a jury, and it is not supposed that any particular form will be required by the courts, but only that the party shall, at the proper stage of the pleading or within the time fixed, make known his wish with reasonable certainty. The ancient conclusion of pleadings, "of this he puts himself on the country," or "this he prays may be inquired of by the country," indicated the mode of trial, that is, that the pleader demanded a jury, and are apt words for the expression of the very thing now required by the law. The meaning of these "conclusions" has been established from "immemorial ages," and when used by the pleader to meet the requirements of existing law, it would seem to be too late to hold them insufficient. But in a recent decision of the Supreme Court of Tennessee, the words, "and of this he puts himself upon the country," as the conclusion to a plea of "not guilty," were held not a demand for a jury, but that the pleader must go further, "*and in terms*" make the demand for a jury.(*a*) Under this decision, the party should say "in terms" at the conclusion of his pleading, or upon the trial docket, "The plaintiff (or defendant) demands a jury for the trial of the issue in this cause."

In cases appealed to the Circuit Court, the demand must be made to the court during the first three days of the term to which the case is appealed. The demand may be made by petition or motion, and entry thereof noted on the minutes of the court. Demand made of the clerk will not do. It must be made to the court, and the minutes should show the court's action upon it (*b*)

(*a*) Gleaves *v* Davidson, 1 Pickle, 380

(*b*) East Tennessee R R Co *v* Martin, 1 Pickle, 134 The demand for a jury in cases arising in the Circuit Court must be made at the issue term, and the court may allow amendments for that purpose at that term 2 Lea, 688 But not after issue joined and continuance had 2 Lea, 684, 9 Lea, 231, 11 Lea, 190 The act does not apply to jury trials in the Chancery Court 6 Lea, 477

§ 4. The law above referred to, in one aspect, requires, in cases originating in any of the courts of record, that the jury be called for in the *first pleading tendering an issue triable by a jury* Only pleas of *traverse* or denial tender an issue The declaration does not tender an issue, and hence the plaintiff cannot at that point in the pleading call for a jury. The general issue is an end of pleading in Tennessee. Suppose the defendant pleads the general issue, and does not call for a jury. How shall the plaintiff obtain one? He can only demand a jury in a pleading *tendering an issue.* But he has put in no such plea Has he lost his right of trial by jury? And so, in any case and at any stage of the pleading, the issue is *tendered* by *one* party to the *other.* If the first does not demand a jury, what becomes of the other's right to one? The language of the act is, that *either* party desiring a jury shall demand the same in *his* first pleading tendering an issue By the literal terms of the act, the right to demand a jury is reserved alone to the party that puts in a plea tendering an issue, and he failing to ask for it, the other is defeated of his constitutional guaranty. If this be the true construction of the act, it is plainly unconstitutional. The legislature may require a party to ask for a jury and treat his silence as a waiver. but it must give him a chance to do so, and it cannot make his right to one dependent upon the act of another. It cannot be supposed that it was the intention of the legislature to fix terms upon one party alone, the one tendering an issue, and leave the other free to insist upon a jury at the trial. Such a construction would defeat the manifest intention of the lawmakers, which was to secure the dispatch of business and lessen the cost of litigation; but if such is the meaning of the law, it leaves it in the power of one party to defeat the other's right of trial by jury without the latter's consent, express or implied, and with-

out any power in him to prevent it.[13] However, the amendment of 1889, without repealing this provision, renders it harmless by securing to either party the right to call for a jury on the first day of any trial term by having an entry to that effect made on the docket.

Before proceeding to explain the manner of choosing the individual members of the jury which is to try the particular case, it may be important to explain how jurors are in the first instance selected or appointed. The mode of procedure differs in its details in the several States, but in all there is some court, or commission, or officer of the law, whose duty it is to make out a list or *panel,* as it was called at the common law, of suitable persons, and require them to be in attendance upon the court

In Tennessee they are appointed by the County Court, from the different civil districts of the county, the justices respectively having the selection of those from their own districts.[14] A copy of the record of their appointment is delivered by the clerk to the sheriff, who summons them to attend the Circuit Court.[15] This copy or list of jurors is not in the form of a writ, but it is called *venire facias,* the name of the writ, which at common law was used for the same purpose, or more briefly the *venire,* and this brief name of the writ has long been applied to the body of jurors summoned, they are called the venire They are a number twenty-five or thirty-seven, at the option of the County Court. If that court fails to nominate, or the whole number fail to attend, the Circuit Court appoints them, or enough to supply the deficiency.[16]

13 The question as to the constitutionality of the law would be removed if the act read, "either party desiring a jury shall demand the same in his first pleading *leading to or accepting* an issue triable by a jury" Whether the courts will so read the act by construction remains to be seen. The exact point discussed in the text has not come before the courts of Tennessee.

14. §§ 4756, 4761, M & V

15. § 4766, M & V

16. §§ 4757, 4768, M. & V.

The names of the whole are written on scrolls, and put into a box, or hat, or other receptacle, and thirteen are drawn out by a child under ten years old These constitute a grand jury, called sometimes a grand inquest. The court appoints one of their number foreman, and they are sworn to inquire into and present all offenses that may have been committed in the county. The court charges them upon their duties, and they retire to their room to prosecute their inquiries in secret [17] The balance of the venire constitute the *petit jury,* or, as it is often called, the *traverse* jury, because it is their business to try the traverses or issues on the trial docket, for it is the traverse or denial of a fact affirmed that makes an issue. It is called a petit jury, in contradistinction to a grand jury. It is also called the *original panel,* in contradistinction to jurors that may be summoned from time to time during the term, as they may be wanted. These are called *talesmen,* because they are to be *such* men, possessed of the same qualifications as the venire or original panel

§ 5. A jury being asked for as required, and the case being called for trial, the first step in the trial is to *impanel*[18] the jury, which now means to select the particular jurors for the trial of the cause, and have them sworn. The court directs the sheriff to bring in the jury. The parties are entitled to the original panel, unless they are out in consultation upon a case, or absent; and if there are not enough of them to make a full panel, the court directs the sheriff to supply the deficiency by summoning from the bystanders, or the county at large. If he knowingly selects incompetent or exceptionable men, he is punishable for it as a contempt of court. They must be men

17. §§ 4791–4798, M & V

18 By *panel* is meant primarily the schedule or list of jurors, it also means the body of jurors on the list, and to *impanel* means primarily to put the jurors' names on the list, or schedule, but now it commonly means to form a jury for the trial of a particular case See the words in Rap & L Law Dic

who "are esteemed in the community for their integrity, fair character, and sound judgment," as well as possessed of the necessary legal qualifications.[19]

When the sheriff has secured twelve men he directs them to the jury box or seats, and then the clerk calls over their names in the hearing of the parties, and if there be no objection, they are sworn and the trial proceeds

But each party in a civil case has a right to challenge the jurors as they are presented. He has two peremptory challenges — that is, he can imperatively object to two, without assigning any reason for it.[20] He may challenge any number for cause. Anything is cause of challenge which renders the juror incompetent to act as a juror in any case, or in that particular case.

To be competent as a juror:

1. The person must be a man.
2. He must be a citizen.
3. He must be twenty-one years of age.
4. He must be a freeholder or householder.
5. He must be of sound mind
6. He must be in full possession of the senses of hearing and seeing[21]

The foregoing may be considered as the *positive qualifications* of a juror. The want of any one of them is cause for challenge But although these qualifications exist, he is yet incompetent or subject to challenge for cause if any one of the following *disqualifications* exist:

1. If he is interested in the case in which he is presented as a juror.
2. If he has an adverse interest in a similar suit involving like questions of fact, or with the same parties.
3. If he is under conviction of a crime rendering him infamous

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19. §§ 4765, 4775, 4806, M & V.
20. § 4788, M & V
21. §§ 4777, 4779, M & V.

4. If he has served as a juror within two years next preceding.

5. If he has a suit pending in the same court.

6. If he is drunk when presented, or has been drunk during the term, or is an habitual drunkard.

7 If he is connected with either of the parties by affinity or consanguinity within the sixth degree computing by the civil law [22]

There are other causes of challenge, as that the juror has prejudged the case, or that he entertains such views about the case or the party as will prevent him from looking alone to the evidence for his verdict;[23] and so it seems the religious views, or rather the want of religious convictions, as that the juror does not believe in the existence of God, is a good ground of challenge [24]

§ 6. All objections to jurors are waived unless they are challenged before they are sworn, whether the ground of challenge be known or not [25] The party can challenge if he chooses upon every legal ground of exception, and have the truth of it investigated; if he omits to do it, it is a presumed waiver, and an acceptance of the jurors Until they are sworn, though selected, the juror may be discharged by the court upon a disclosure on oath of his own incompetency, unless it is expressly waived, and we suppose he might be challenged on such disclosure [26] If, upon being challenged and sworn, he answers falsely as to his qualifications, it will be ground for a new trial

22. §§ 4778, 4779, 4785, 4786, M & V

23 McLain *v* State, 10 Yerg. 241, Williams *v* Godfrey 1 Heisk 299, Brakefield *v.* State, 1 Sneed, 215, Draper *v.* State, 4 Baxt 253

24 McClure *v.* State, 1 Yerg 206. This case does not directly support the text. The case went off on the ground mainly that the objection to the juror came too late, it being relied on or made known first on a motion for new trial. If the objection had been made at the time the juror was presented, it is clear the reasoning of Peck, J., would have controlled the court.

25. McClure *v* State, *supra;* Gillespie *v* State, 8 Yerg 507, Ward *v* State, 1 Humphr 252, Draper *v* State, 4 Baxt 253

26. Hines *v* State, 8 Humphr. 597.

Whether, if the party knew and had the evidence at hand to show the truth of the cause of challenge, and did not do it, he could have a new trial, would be a different question.

The court is the trier of the juror's competency on a challenge.[27] It is tried usually upon the juror's own oath, whereupon the party is confined to no set questions, but may ask any that may be calculated to test his competency.[28] The court cannot legally try it, however, except upon a challenge either to the whole panel, as is usual in criminal cases, or to the particular juror, which is usually the only mode in civil cases. Without a challenge, there is no question of competency before the court, in which an oath can be administered to the juror or anybody else.[29]

§ 7. When twelve unexceptional jurors are selected, the next step is to swear them, which may be done in either of three ways:

First. By the jurors laying their hands on the New Testament, when the clerk administers the oath to them, as follows:

> You, and each of you, do solemnly swear upon the Holy Evangelists of Almighty God, that you will well and truly try the issue joined between A. B., plaintiff, and C. D., defendant, and a true verdict give according to the law and evidence.

When the clerk finishes the recitation of the oath, each juror kisses the book, as a seal of confirmation of the engagement.

If there be more than one issue, say, "issues joined." If it be on an appeal from a justice there is no issue joined; then say, "the matters in controversy," instead of issue joined. If on an inquiry of damages where

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27 McGowan v. State, 9 Yerg. 185.
28 Fletcher v. State, 6 Humphr. 250.
29 State v. Moffatt, 7 Humphr. 255.

judgment by default is taken or demurrer overruled, say, "you will well and truly inquire of the damages, and a true verdict render," or "you will well and truly assess the damages," etc.

Second. If any one of the jurors is conscientiously scrupulous of taking the *book oath*, which is what the preceding form is called, he may be sworn with the right hand uplifted in the following form:

You solemnly appeal to God as the witness of truth and avenger of falsehood, as you shall answer for the same at the great day of judgment, when the secrets of all hearts shall be known, that you shall well and truly try (etc., as in the book oath)

Third. It may be, and it sometimes does occur, that a juror objects upon conscientious grounds to taking an *oath* at all, and then they may make solemn *affirmation* in the following words:

You solemnly affirm that you will well and truly try (etc., proceeding as in the first form).

Persons may be sworn according to the forms of their own country or particular religious creed when they require it. The principle of the law is, that an oath is to be administered in that form which the deponent considers binding on his conscience. He is allowed to consult his own conscience as to the form, and then when he takes the oath he is guilty in law if he violates it. Jurors and officers, it is true, are not guilty of perjury for a violation of their oaths. But these provisions apply to all who take oaths.

§ 8. The jury being sworn, the next step is to inform them what that issue is which they are sworn to try. This is done by reading the pleadings to them; for in them alone can they see what is the issue. The plaintiff reads to them the declaration and all the pleadings, or he may leave it to the defendant to read his part of the

pleadings. If it be a matter in which there are no pleadings, as an appeal from a justice, the warrant only is read, or, in other cases, whatever will inform them of the matters in controversy. This was the ancient English practice. But in England now, and in many, if not most of the States, the practice is for the counsel holding the affirmative of the issue, usually the plaintiff, to open the case by a speech in which he states the issues presented, and what evidence is intended to be produced, and then adduces the evidence, and the adverse side is opened by counsel in like manner, and the evidence produced; and a reply from the plaintiff, with his rebutting evidence, closes the case.

In Tennessee the practice is simply to read the pleadings, and then the plaintiff, if he has the affirmative of the issue, introduces his evidence.

§ 9. The first step to be taken in introducing the evidence is for the plaintiff to call all his witnesses to the clerk's stand and have them sworn The clerk regularly administers the oath, but the judge or anybody else under his direction may do it. The oath may be administered in the same variety of forms mentioned above, and the witness may in like manner solemnly affirm. The book form of oath for the witness is as follows:

> You do solemnly swear upon the Holy Evangelists of Almighty God that the evidence you shall give in the case on trial between A. B, plaintiff, and C D, defendant, shall be the truth, the whole truth, and nothing but the truth

The defendant then calls his witnesses, and they are in like manner sworn But if they are not to be put under the rule, the plaintiff gets through with the examination of his before the defendants are called and sworn.

§ 10. The witnesses may be *put under the rule*, which means putting them in the care of the sheriff, or other officer, with instruction to keep them in a room, or out

of the courthouse, and so that they cannot hear what is said by the witness who is being examined. This makes it necessary for each witness to rely upon his own recollection and knowledge of the facts deposed to, and prevents in a great measure corrupt combinations of the witnesses to tell the same story Upon motion of either party, this rule is granted. Whether or not it might be refused by the court, if no necessity for it was seen, is considered doubtful.[30] If no such rule is asked, the plaintiff, or the party upon whom rests the *onus probandi*, or the burden of making the first proof, introduces his evidence, and that party is the one who has the affirmative in the issue [31]

§ 11. If there be objections to the competency of a witness they should be made known when he is offered or called for examination. A witness may be incompetent because.

1. One of the parties is the husband or wife of the witness, and the inquiry relates to facts that came to the knowledge of the witness by reason of the marital relation.[32]

2 He is a party to a suit which is brought by or against an administrator, executor, or guardian, and the inquiry relates to transactions with or statements by the testator, intestate, or ward.[33]

3. He has not sufficient capacity to understand the obligation of an oath [34]

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30 1 Greenl Ev, § 432

31. 1 Greenl Ev, § 74

32 § 4563, M & V., Orr *v* Cox, 3 Lea, 617 So though relation severed when witness offered Wilson *v.* Patton, 2 Lea, 101

33 § 4565, M. & V But *devisavit vel non* is not a suit by or against an executor or administrator, and devisees may prove declarations of the testator Beadles *v* Alexander, 9 Baxt. 607. Children and heirs-at-law of a decedent are not excluded. O'Neal *v.* Breecheen, 5 Baxt 604, Hughlett *v.* Conner, 12 Heisk. 83.

34. § 4560, M. & V , 1 Greenl Ev, §§ 365–368.

4. He has been convicted of infamous crimes, and has not been restored to citizenship [35]

5. He is a party to a suit in which the adverse party is incapacitated to testify by reason of idiocy, lunacy, or other insanity, and the inquiry relates to transactions or conversations with or statements by such adverse party.[36]

§ 12. The party introducing a witness examines him first, which is called the *direct* or *original* examination. When he is through, the other party examines him, which is called the *cross-examination.* Then the witness may be *re-examined* by the first party, which closes the examination, unless the judge, for satisfactory reasons, deems it proper to permit further examination by either side. Upon the direct examination, *leading questions*, such as suggest or lead the witness to the answer desired, cannot be propounded. But there are exceptions to this rule The rule is to be understood in a reasonable sense, for if it were not allowed to *approach* the point by leading questions, the examination would be most inconveniently protracted. The rule therefore is not applied to that part of the examination which is merely introductory of that which is material. And, again, it is relaxed, and leading questions allowed, where the witness appears to be hostile to the party calling him, or unwilling to give evidence. Indeed it is said, when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the court; a discretion, however, which must be exercised only so far as the ends of justice plainly require it [37] Leading questions may be asked the witness, on cross-examination, without restriction.

The proper time to make objections to the admissibility of evidence is when it is offered. Illegal as it may be,

35. § 4562, M & V; 1 Greenl Ev, §§ 372 3
36 § 4564, M & V
37. Moody v Rowell, 17 Pick 498, 1 Greenl Ev, §§ 434, 435.

the adverse party may be willing to admit it. The mere fact, however, of his not objecting is not of itself regarded as sufficient evidence of his willingness. It requires either an express assent, or some act sufficient to prove assent, else he may, at any time before the case is submitted to the jury, demand its withdrawal from their consideration.[38] The principle is, that he is not to be prejudiced by illegal evidence without his own consent. But if he does not ask the court to withdraw it from the jury, that is a waiver of all objection to it, and he cannot have a new trial on the ground of its illegality.[39] But a party who asks for illegal testimony cannot afterward demand its exclusion from the jury, or object to evidence offered on the same point by his adversary.[40]

§ 13. The parties must confine their evidence to the matter in issue between them. Any fact, however, may be proved, which has a reasonable tendency to elucidate the matter in controversy. The fact in issue may be proved not only by direct evidence, but by circumstances from which it may be reasonably inferred, which is called circumstantial or presumptive evidence.[41]

§ 14. The best evidence of which the case in its nature is susceptible must be produced. Not the highest degree of evidence is required; but an inferior kind is not to be substituted for a higher kind, if the latter exists and can be procured. Thus a copy of a writing shall not be produced when the original can be had. A contract is not to be proved by parol evidence when it appears it is in writing.[42]

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38. Creed v. White, 11 Humphr. 549, Carper v. Barnes, 4 Sneed, 450, Birchfield v. Russell, 3 Coldw. 231.

39. Jackson v. Dillon, 2 Tenn. 261, Ewell v. State, 6 Yerg. 373, Richmond v. Richmond, 10 Yerg. 343.

40. Brown v. Williams, 4 Humphr. 22; Hughes v. Whittaker, 4 Heisk. 402, State v. Becton, 7 Laxt. 141.

41. 1 Greenl. Ev., §§ 51–55; Polk v. Robertson, 1 Tenn. 456.

42. 1 Greenl. Ev., §§ 82–97.

§ 15. The witness is not to testify what he heard another say as evidence of the fact so heard; but if the fact to be proved is that a man said a thing, then of course it is admissible. So the words may have been part of an act, and necessary to understand the meaning of the act. Pedigree, family, marriage, boundaries, and some other facts may be proved by reputation. So may matters of public interest — declarations of a party against his interest, and the dying declarations of a murdered man as to who killed him, on a trial for the homicide [43] So when a witness is dead, insane, disqualified, removed and cannot be found, what he swore on a former trial of the case is admissible.[44]

The admissions and confessions of parties are always evidence against them; and all they said at the same time is evidence for them; but not what they said at any other time [45]

§ 16. Upon grounds of public policy, the communications between client and attorney are not demandable in evidence by the adverse party, and an attorney cannot give evidence of his client's communications to him without his consent [46] Nor is he to produce his client's documents.[47] Secrets of State are not demandable in evidence of its officers, nor the proceedings of the grand jury Nor evidence indecent or injurious to third persons, where the parties themselves have no interest in it, but what they have impertinently created. And, on like grounds, communications between husband and wife are excluded.[48]

§ 17. A witness is to state only facts, not opinions or inferences from facts [49] He must speak from his own knowledge and recollection; but he may refer to any

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43. 1 Greenl Ev, §§ 98–126
44. 1 Greenl Ev, §§ 163–168
45 1 Greenl Ev, §§ 169–235, Haisten v Hixen, 3 Sneed, 691, Crawford v State, 4 Coldw. 193
46 § 4748, M & V
47. 1 Greenl Ev, §§ 237–246
48. 1 Greenl Ev, §§ 250–254
49. 1 Greenl. Ev, § 440

writing which he may have or may be handed him, to refresh his memory.[50]

Belief or opinion is admissible as to the identity of persons or things, and as to handwriting, from those who are acquainted with the person or thing or handwriting. So opinions are allowed on questions of science, skill, or trade, from experts in that department. So of sanity or insanity, with some qualifications.[51]

§ 18. Aside from disproving the facts stated by a witness by the testimony of other witnesses, his credit may be impeached in other ways.

1. By evidence affecting his general character for veracity. But the examination of the impeaching witnesses must be confined to general reputation, and will not be allowed to extend to particular facts. The usual mode is to inquire of the impeaching witness: first, whether he knows the general reputation of the person in question among his neighbors; second, what that reputation is; third, whether the witness, from such reputation, would believe that person on his oath.[52] When the witness is attacked by a negative answer to the last question, and is not supported in his statements by corroborating evidence of the facts to which he deposes, or sustained in his reputation by the testimony of other witnesses, the trial judge has no alternative but to disregard his testimony.[53]

2. The credit of a witness may also be impeached by proof that he has made statements, out of court, contrary

50. 1 Greenl Ev, §§ 436–438
51 1 Greenl Ev, §§ 440, 441
52 Ford *v* Ford, 7 Humphr 102, Gilliam *v.* State, 1 Head, 39
53 Scott *v* Britton, 2 Yerg 222. This case supports the text, but it was a suit in equity, where the judge was the trier of the facts In a jury trial they try the facts, and in case a witness is impeached they are to determine the weight, if any, that is to be given his testimony, under instructions from the court. As to what are proper instructions, see Wilcox *v.* State, 3 Heisk. 117. And as to the right of the jury to determine the credibility of witnesses, see Young *v.* State, 2 Yerg. 249, Kirby *v.* State, 3 Humphr 304.

to what he has testified at the trial. But it is only in such matters as are relevant to the issue that the witness can be contradicted. And to lay ground for evidence of conflicting verbal statements, the witness must be first asked whether he had made such statements, giving, as near as may be, the time and place, and the person to whom the supposed statements were made. It is not enough to ask him the general question whether he has ever said so and so. He may not remember what he has said, and common justice requires that his attention be called to the subject by the circumstances of time, place, and person, that he may have an opportunity to correct his present statement, or the nature or meaning of what he may elsewhere have said.[54] If the witness denies having made such statements, then it is competent to introduce contradictory evidence If he admits the inconsistent statement, such evidence becomes unnecessary.

3. A witness may be impeached in the cross-examination by involving him in inconsistencies It is claimed for cross-examination, that it is one of the principal and most efficacious tests which the law has devised for the discovery of truth. But it is also truly said that the latitude which the law allows for cross-examination is very liable to abuse. A mere impertinent inquiry, calculated and intended to test the witness' power of self-control, and, if possible, to throw him off his guard, should never be resorted to or allowed[55] Browbeating and terrorizing the witness neither exalts the lawyer nor benefits the client, and when it is resorted to, to confound a witness whose only fault is that he has been called to testify by the opposite party, it is unmanly and in the highest degree reprehensible. When such a course

54. 1 Greenl Ev, § 462, Bounds *v.* Schwab, 5 Sneed, 592; Richmond *v.* Richmond, 10 Yerg 343.
55. 1 Greenl Ev., § 456a.

of cross-examination is pursued in the presence of the court, it should be promptly checked, and the witness told that he is not obliged to submit to insult If the character of the cross-examination indicates a disbelief in the statements of the witness, the party calling him may, for that reason, call other witnesses to sustain his character.[56]

When a party offers a witness, he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the court, the law will not allow him to impeach their general reputation for truth. But this general rule does not apply where the witness is not one of the party's own selection, such as the attesting witnesses to a deed or will, or other written instrument, and which the law obliges him to call Nor does the rule prevent the party from disproving the statements of his own witness by the testimony of other witnesses.[57] Merely taking the deposition of a person, or having him sworn for examination, does not make him the witness of the party who takes the deposition or has the witness sworn, and his credibility may be impeached by that party, if his adversary reads the deposition or examines the witness.[58] If the deposition of a witness is taken and read by both parties, he would be equally the witness of both, and neither party could impeach his credibility.[59]

Documentary evidence, being properly authenticated or proved, is introduced on the trial by reading it to the court and jury.

At the conclusion of the introduction of evidence by the plaintiff, the defendant may be of opinion that the

56. Richmond *v* Richmond, 10 Yerg 346

57. McLarin *v.* State, 4 Humphr. 381; Jones *v* Carnes, 2 Yerg 71; Rose *v* Allen, 1 Coldw 27, Alexander *v.* Beadle, 7 Coldw. 128, 1 Greenl. Ev, §§ 442, 443

58. Richmond *v* Richmond, 10 Yerg. 346.

59 Story *v* Saunders, 8 Humphr. 666.

plaintiff has not made out his case, and if so he may submit the matter to the court upon a DEMURRER TO THE EVIDENCE. It is analogous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue.(*a*) All the evidence presented by the plaintiff must be reduced to writing and incorporated in the demurrer;(*b*) and the demurrer must admit the truth of the evidence and of every legitimate inference to be drawn therefrom.(*c*) The defendant cannot introduce evidence in his own behalf and then demur. The demurrer comes too late after he has presented his case in the proof (*d*) The demurrer to evidence waives all exceptions to the admissibility and competency of the evidence demurred to, and hence it must contain the whole proof, competent and incompetent (*e*) The following is submitted as the form of such a demurrer:

Demurrer to Evidence.

A. B. }
C D }

The defendant declining to introduce evidence in his own behalf demurs to the plaintiff's evidence, which is as follows (Here insert the plaintiff's evidence in full) And the defendant admitting the truth of said evidence and of every legitimate inference that may be drawn therefrom, demurs thereto, and for cause of demurrer says the same is insufficient in law to maintain the plaintiff's cause of action The defendant prays judgment upon his demurrer.

G H,
Attorney

Having submitted the case upon the demurrer, neither party, after judgment thereon, can resort to proof. The judgment on the demurrer is final.(*a*)

If there is any evidence to sustain the issue, the demurrer should be overruled;(*b*) and so if the proof tends

(*a*) Steph. Pl (Andrews' ed) 180.
(*b*) 12 Pickle, 409
(*c*) 12 Pickle, 459
(*d*) 12 Pickle, 466
(*e*) 23 Pickle, 635.
(*a*) Encyc Pl & Pr, vol 6, p 455
(*b*) Encyc. Pl & Pr, vol. 6, p 453.

to establish the issue.(*c*) But if the court, conceding all inferences which the jury could justifiably draw from the evidence, is satisfied that it is insufficient to warrant a verdict, the demurrer should be sustained.(*d*)

If the defendant cannot safely rely upon the demurrer, then, as before explained, at the conclusion of the plaintiff's proof, he introduces witnesses in his own behalf

§ 19. The evidence being completed, the argument commences The counsel having the affirmative, or that side upon which the *onus probandi* rests, is entitled to the opening and concluding argument. If there be but one on that side, he will be entitled to an opening and also a concluding argument If there be several on each side, the order of argument is under the control of the court, but they are usually allowed to speak alternately If, in the concluding argument, new authorities are adduced, the opposite party may comment on those authorities, but no more.

§ 20. Next comes the charge of the court to the jury. In regard to this, the Constitution of Tennessee provides that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."[60] The word "charge" here means "to instruct authoritatively," which is one of Webster's definitions of the verb. They may state — that is, narrate the testimony, but whether the narration is correct, and what deductions are to be drawn from it as to the matters of fact in issue, the jury must judge for themselves, except in one case, and that is where, from certain facts, the law itself raises a presumption that a certain other fact is true. The deduction, then, is not "a matter of fact," but of law. These presumptions of law are, in some

(*c*) 23 Pickle, 646
(*d*) Encyc Pl & Pr., vol 6, p 452.
60 Const Tenn, art 6, § 9

cases, *conclusive,* and no amount of evidence is allowed to repel them. In other cases, they are *disputable,* and may be overthrown by rebutting evidence.[61] Upon these the judge may charge that if the facts from which the law deduces the presumption be proved, they must take the presumed fact to be proved

When it is said that judges may "*state* the testimony and *declare* the law," it must be meant that their announcement of the law is to be received in a different sense from their statement of the testimony. If the jury were to receive the statement of the law and the fact with the same degree of consideration only, rejecting either according to their own judgment, the whole provision would have been unmeaning. It is therefore well settled, under the Constitution, as well as at common law, that whatever the court charges or declares the law to be, the jury are bound to receive it as law, whatever may be their opinion of its correctness [62]

But in Tennessee, and some other States, it is the settled law that in criminal cases the jury may take upon themselves the responsibility of determining what the law is, in disregard of the charge of the court.[63] It is provided in the Constitution (Tennessee), that "in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases," [64] and so they do in all cases, civil and criminal, determine the law and fact, "under the direction of the court," whenever they give a general verdict. The distinction made by the decisions is, that the direction of the court is imperative in civil and advisory in criminal cases.

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61. 1 Greenl Ev, §§ 14–44
62 1 Greenl Ev, § 49, and note McCorry *v.* King's Heirs, 3 Humphr 271.
63. McGown *v* State, 9 Yerg 196, Dale *v.* State, 10 Yerg. 555.
64 Const Tenn art. 1, § 19

The charge of the court in civil cases is oral, unless one of the parties request the judge to reduce it to writing, and then it is his duty to write every word of it, and read it to the jury without oral comment, and the same is required as to all subsequent instructions asked for.[65] And so, if the trial is before the court without a jury, the judge shall, on the request of either party, reduce his decision to writing, stating the facts found and the conclusions thereon, which shall constitute a part of the record.[66] When instructions are asked for on any point, the court may require the party to reduce them to writing.[67] The judge, in his charge, is to omit no exposition of the law that the facts of the case may render necessary to the proper direction of the jury.[68]

§ 21. When the judge has charged the jury, the plaintiff may see that he cannot recover. If the jury render a verdict against him, he can never bring another suit for the same cause, and all remedy will be gone unless he can get a new trial, and he may not have sufficient ground for that. He may save himself from being thus finally barred, by taking a nonsuit at any time in the progress of the case, before the jury retires, either as to all or any one of the defendants But where the defendant has pleaded a set-off or counterclaim, his right to have a verdict on it is not to be affected by the plaintiff's nonsuit, but he may proceed on it in the capacity of a plaintiff. And whether the plaintiff takes a nonsuit or not, the defendant has a right, at any time before the retirement of the jury, to withdraw his set-off or counterclaim.[69] But where the nonsuit is taken as to the party upon whom the original process was served, and there remains only a defendant upon whom a counterpart was

65 § 3672, M & V 66. § 3673, M & V.
67. § 3681, M & V
68. Allen *v* State, 5 Yerg 455; Ivey *v.* Hodges, 4 Humphr. 155.
69. §§ 3678, 3679, M. & V.

served in another county, he may plead that matter in abatement at once, and thus be discharged himself.[70]

If in the action of replevin the plaintiff dismisses his suit, or if at any time it is dismissed on motion of defendant, because the plaintiff fails to prosecute it, judgment is rendered against him that he return the property, or its value if he fails to return it, and the defendant also recovers damages against him for the time he has detained it. The jury trying the case therefore goes on and assesses the value and damages. When it is dismissed on defendant's motion, for a failure to prosecute the suit, a jury is impaneled to assess the damages and value.[71]

When the court tries the case without a jury, the nonsuit or withdrawal of the counterclaim is to be before the case is finally submitted to the court; that is, when the evidence and argument are through, and before the court has pronounced judgment or retired from the bench with the case, or passed to the consideration of other cases.[72]

§ 22. When the jury have received the charge of the court, it is then their duty to consider of their verdict. If the matter be plain, they may announce their verdict without withdrawing from the jury-box, but they usually retire for consultation, comparison of views, and final agreement. In capital cases the law requires that juries shall remain together and apart from other persons, from the time they are selected until they are discharged.[73] In civil cases the law does not seem to be so strict. Pending the trial of such cases they may disperse on the adjournment of the court from day to day. But after the charge of the court has been delivered, the rule requires them to remain together until they have returned

70 Yancy *v* Marriott, 1 Sneed, 28
71. § 4126, M & V. 72. § 3680, M. & V.
73. McLain *v.* State, 1 Yerg 241, Wesley *v.* State, 11 Humphr. 502.

their verdict, or have otherwise been discharged from their deliberations. In the absence, however, of specific instructions to the jury on this point, their separation, if it occurs, will be presumed to be by consent of the parties. Tampering with the jury is severely condemned in the law, and if it be by a party, a verdict in his favor will be set aside, whether what he did controlled the verdict or not; and whether by the party or other person, if the improper influence affected the verdict it will be set aside, and in all such cases the guilty persons are punishable for a contempt of court [74]

If a juror at any time becomes too sick, or unable from any cause to perform his duty, the court may discharge him; and then it devolves first upon the parties to dispose of the case by consent. They may continue it, or agree that the remaining jurors shall try it, or that another juror shall be supplied and the case proceed, or a new jury be impaneled and the trial commence anew. If they do not arrange it, the court may either supply the vacant place by having another juror summoned and sworn, or discharge the whole jury and impanel another, and in either case the trial commences anew [75] If a juror were absent for an unknown cause, could he be presumed unable to attend? If he were known to be able, would the cause have to wait until he could be brought in by attachment? The consent of parties in either case might obviate any inconvenience

If in their consultations the jury disagree as to any question of law, they may return and state it to the

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74 Davidson *v* Manlove, 2 Coldw 346, Turner *v* St John, 3 Coldw 376 In the last case cited the offending person was an attorney in the case, who talked about the trial in the presence of the jurors, and the Supreme Court said his conduct was most unprofessional, indelicate, and reprehensible, for which it may have been the duty of the court to strike his name from the roll of attorneys See also Sexton *v.* Lelivrre, 4 Coldw. 11.

75. §§ 3676, 3677, M. & V.

court, and be again instructed. To the court, and not to books, they must look for the law. If they disagree as to what the evidence was, they may return and hear the witness again They cannot hear him out of court. Nor can they receive any new testimony without the consent of parties. The witness, when recalled, can only repeat what he said before. In practice the jury may carry with them the pleadings and, perhaps, instruments of which *profert* is made, and the judge's charge. But the strict legal right is confined to the pleadings and the judge's charge. Other papers could be included only by consent of parties. Formerly the legal right was more liberal in Tennessee.[76]

Until the jury have agreed, they may be discharged at any time by the consent of the parties; but, without their consent, they should not be discharged by the court until it becomes evident that it would be useless, or would amount to coercion, to keep them any longer together. Discharging the jury before they agree makes what is called a mistrial; and so if the court adjourns before they agree Another trial at the succeeding term is the consequence of a mistrial

§ 23. When the jury have unanimously agreed, they return into court and pronounce their verdict They usually select a foreman to pronounce it. If either party chooses, he may have the jury *polled*, that is, called over one by one, and each to respond as to what the verdict is. If any one dissents, they retire, or a mistrial is entered.[77] The verdict must be unanimous.

The verdict may be either *general* or *special*. The former is a finding for the plaintiff or defendant generally. The latter is of two kinds: 1. Where they find the facts, and leave it to the court to pronounce judg-

76 Car & Nic 540

77. People v Goodwin, 18 Johns 188, 3 Cow. 23; 1 Ill 109; 7 Ill. 342, 9 Ill 536

ment for whichever party may be entitled to it upon those facts; and they further provide that if the court should be of opinion upon the facts that the law is for the plaintiff, then they find for him so much debt or damages; but if for the defendant, then they find for him. 2. They may find generally for the plaintiff his debt or damages, or whatever else he sues for, but subject to the opinion of the court upon a *special case* in regard to a matter of law; and should the court be of opinion upon the case stated that the law is for the defendant, then they find for him.[78] The jury may thus get rid of the responsibility of deciding the law.

Such verdict must find the facts positively, not circumstances from which the facts may be inferred. The court cannot presume one fact to be established from another found, however legitimate the inference may be, unless it is a presumption of law.[79]

When it is settled what their verdict, either general or special, is, they are discharged, and if it is a general verdict it is entered by the clerk; but if a special verdict, it is to be drawn up by counsel, under the direction of the court.[80]

§ 24. In civil cases juries are to give their verdicts according to the weight of evidence. A bare preponderance on one side or the other carries the verdict.[81] There is an exception in the case of the plea of justification to an action for slander in charging the plaintiff with crime. The plea that the words are true must be sustained by the same degree of evidence, it is said, that would be required to convict the plaintiff on an indictment for the crime imputed to him.[82] Where, in the opinion of the

78 3 Bl Comm 377. 79 Jones *v.* State, 2 Swan, 399

80 Bouv Law Dict, Verdict

81. 2 Whart Ev, § 1246, note 1, Chapman *v* McAdams, 1 Lea, 500, Hills *v* Goodyear, 4 Lea, 236

82. 2 Greenl Ev, § 426; Hill *v.* Goodyear, 4 Lea, 236; Coulter *v.* Stuart, 2 Yerg 225.

jury, there is no preponderance of evidence on either side, but it is a balanced case, they must give their verdict against the party upon whom the burden of proof devolved. It was his duty to prove that he was entitled to a verdict, and he has certainly failed to do so, if, when his evidence and his adversary's are both put into the scales, neither preponderates.[83]

§ 25. Where there is a plea of set-off, the jury is to find what the plaintiff and defendant are each entitled to under their respective claims, and the excess, if any, in favor of either.[84] The verdict and judgment, where there are several defendants, shall be molded according to the facts and the exigencies of the case.[85]

§ 26. In detinue the defendant has possession of the property, and on verdict for the plaintiff the jury assess his damages for the detention of the property which he is entitled to. They also find the value of the property. Although the plaintiff obtains a judgment for the property itself, yet it may be destroyed or run off, so that the sheriff cannot find it. Therefore the value is to be assessed by the jury, so that the plaintiff may get that, if he cannot get the specific property. But as some of it may be got and some not found, the verdict ought to value each article separately, so that the value of such as may not be found may be collected. If all the property be alike in its character, and so described in the pleadings — as, if it be so many barrels of corn, so many pounds of tobacco, so many hogs, horses, or cows — then a general assessment of value ought to be made. But if it be for distinct and separate articles, having no identity of character — as if it be for a horse and a wagon — the value must be assessed separately.[86] If they

83. Hamilton *v* Zimmerman 5 Sneed, 39
84. § 3632, M. & V., Acts Tenn., 1879, chap. 222
85. § 3633, M. & V.
86. Pickett *v* Bridges, 10 Humphr. 171.

do not find the value, a writ of inquiry is awarded to ascertain it.[87] This may be done immediately. If the omission is ascertained before the jury disperse, they will be instructed to retire and find the value. If, however, on an issue embracing several articles, the verdict be for part only, it is not error, but the title or claim of the party to the articles omitted is barred.[88]

§ 27. In the action of replevin, the plaintiff has possession of the property, and a verdict for him only finds damages against the defendant for seizing and detaining the property, on which judgment goes for the damages and costs.[89]

If the verdict is in favor of the defendant, it must also find damages in his favor against the plaintiff, for the detention of the property from the time it was taken from the defendant on the writ to the date of trial. The verdict also finds the value of the property in the same way and for the same reason that it is found in detinue, where the verdict is in favor of the plaintiff. Judgment is to be rendered against the plaintiff for the return of the property, and if that cannot be had, for the value Damages for either party may be exemplary in proper cases,[90] that is, when the conduct of a party has been very bad, he may be chastised by such damages as will make an example of him.

§ 28. In ejectment, the verdict may be for any specific part of the land claimed, or any specific share of it. And the part recovered should be specified with reasonable certainty, by metes and bounds, or other sufficient description. And this should be done in all cases where the dispute is about boundary. If the verdict is not sufficiently descriptive to enable the sheriff to deliver possession, it is a nullity; and if the evidence is not cer-

87. § 5020, M & V.
88. § 5021, M & V.
89 § 4125, M. & V.
90. §§ 4126, 4127, M. & V.

tain enough to enable the jury to ascertain the boundaries of the part they would give to the plaintiff, the case should be delayed until it can be made certain by surveys or other evidence.[91]

The verdict may specify, also, the extent and quality of the plaintiff's estate; that is, whether it is for years, and how many years, for life, and whose life, or in fee; whether absolute, or determinable upon conditions, and what conditions. And this may be very important, for a general verdict, without specifying the part he recovers, entitles the plaintiff to the whole of the premises described in his declaration; if it does not describe the quality and extent of his estate, he is entitled to that quality and quantity which is set out in his declaration

The verdict may be for some of the plaintiffs, and against some, for some of the defendants, and against some. It may find some of the defendants guilty of detaining one distinct part of the premises, and some another part, or all guilty of the whole, according to the facts, and judgment shall be given accordingly.[92]

Only nominal damages are given in ejectment, the real damages being recovered in an action for mesne profits.[93] If the plaintiff's interest expires after suit brought, and before trial, the verdict shall find the fact, and damages, for which judgment shall be rendered for the plaintiff, and as to the land the defendant is discharged.[94] In this case, the damages are to be actual, not nominal[95]

§ 29 Different rates of damages were formerly recovered in different forms of action. Thus, in trespass for taking personal property, damages might be recovered, not only for the value of the property, but for the aggravating circumstances attending the wrong. But if trover had been brought for the very same wrong,

91 Loard *v* Phillips, 4 Sneed, 566.
92 §§ 3969-3974, M. & V.
93 § 3999, M. & V
94. § 3973, M. & V.
95. 3 Pars Cont 220.

only the value of the property could be recovered. These forms being abolished, the plaintiff may now recover whatever damages he might have recovered in *any* form of action for the same cause.[96] Larger damages than are laid in the writ cannot be found. But if they are, the plaintiff may remit the excess, and have judgment for the amount claimed in the writ.[97]

§ 30. The verdict of a jury without an issue to try is a nullity, and affords no legal authority for a judgment rendered thereon.[98] A verdict must respond to all the issues joined, but a technical response is not necessary, for if its sense or legal effect makes a response to the pleadings, the court will sustain it and pronounce judgment on it.[99] And if it be a general verdict, although it may not in terms answer every issue, it will nevertheless be held to embrace every issue, unless exception is taken at the term at which the verdict is rendered.[1]

§ 31. If damages are found for the plaintiff, where there are some good and some bad counts in his declaration, and the verdict is general, not specifying upon which count the damages are found, it is to be presumed they were found on the good count.[2] By the common law such a verdict was bad, and would be set aside, because it might have been that the jury gave the damages on the bad counts.

§ 32. When the verdict is rendered the judgment on it is the next step in the history of a lawsuit. Judgment

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96 § 3689, M & V

97. Fowlkes *v* Webber, 3 Humphr 530

98. Mayfield *v.* Beech, 2 Sneed, 444, Trabue *v.* Higden, 4 Coldw 620

99. Lowery *v* Brown, 3 Sneed, 17; Robb *v* Parker, 4 Heisk 67

1. § 5019, M & V There is much discussion and some conflict of authority in Tennessee on the subject of verdicts responding to the issues The older cases are not in harmony with the more recent Statutory changes have made the rule less strict See generally on the subject, 3 Humphr. 84, 7 Humphr. 220, 532, 10 Humphr 181, 4 Yerg 565 and ed. note, 5 Yerg. 99, 9 Yerg. 453.

2. § 3683, M & V

is not pronounced in form by the court or demanded by the party in whose favor the verdict is given. That was the common-law practice, but great evil resulted from it. Verdicts were entered and the rendering of judgments forgotten. Under changes made in the law, perhaps in all the States, the clerk of the court now enters up judgment on the verdict of the jury, without demand of the party or actual order given by the court If there be no objection interposed, the judgment follows the verdict on the record or minutes as of course The minutes are read each morning in open court and signed by the judge. Thus the attorneys and the judge hear the judgment read the day after it is rendered, and if it is not the proper judgment on the verdict, it can be corrected

It must be in accordance with the verdict, which is the only authority for rendering it If the verdict is unauthorized, it will be set aside, and the judgment entered by the clerk goes with it.

§ 33. Every defendant originally sued must either be discharged by the plaintiff or judgment by default taken against him, or he must appear and plead with the others, otherwise a verdict and judgment against any of them is erroneous. Where judgment by default is taken against one who does not appear, the inquiry of damages as to him must be submitted to the same jury that tries the issue as to the others.[3]

§ 34. If two or more persons be jointly sued for a trespass, the verdict may be against all for one sum as damages, or it may be against each separately for distinct and different sums, and judgments may be entered thereon accordingly.[4] There can be but one satisfaction, however, in favor of the plaintiff, and if he collect either

3 Hutchins *v* Sims, 7 Humphr 236

4 Knott *v* Cunningham, 2 Sneed, 205, overruling in effect Davis *v* Chance, 2 Yerg 94 The text is not fully supported by this case, but such must be the effect of sections 3686–3688, M & V. See also 1 Pars. Cont. 28; Halsey *v.* Woodruff, 9 Pick. 555.

one of the sums so assessed, it will bar his right to collect the others, except as to costs. If the several assessments vary in amount, the plaintiff may elect to take the larger sum, or if the defendants are not all solvent, he may elect to proceed against the solvent party.[5] And so it seems, if there be several assessments, the suit being against all jointly, the plaintiff may elect which sum he will, and remitting the others, enter judgment for that sum against all.[6]

§ 35. In concluding this chapter a few illustrations of forms for entering verdicts and judgments on the minutes are submitted for the benefit of the student.

A B
v
C D

No. 1. For Plaintiff on Note.

Came the parties, and also a jury of good and lawful men, to wit, E, F, G, etc. (twelve to be inserted), who being elected, tried, and sworn the truth to speak upon the issues joined, upon their oath do say they find the issues (or, issue) in favor of the plaintiff, and that the defendant is indebted to him one thousand dollars principal and fifty dollars interest on the note sued on It is therefore considered by the court that the plaintiff recover of the defendant one thousand and fifty dollars and the costs of suit.

These entries are all the same to the words "do say," and that part will be omitted in the succeeding illustrations:

No. 2. Part Payment Found.

Say that the defendant has paid five hundred dollars of the debt in the declaration mentioned, and that the residue of five hundred dollars, with fifty dollars interest thereon, remain unpaid It is therefore considered by the court that the plaintiff recover of the defendant five hundred and fifty dollars and the costs of this suit

Where the defense is by plea of set-off, the entry may be in three forms. If the plaintiff's demand exceeds the defendant's, the entry is as follows:

5. Knott *v.* Cunningham, 2 Sneed, 210.
6. 1 Pars. Cont. 28, note 1.

No. 3. Set-off: Judgment for Plaintiff.

Say that the plaintiff's debt of one thousand dollars, and fifty dollars interest thereon, remains due and unpaid by the defendant; and that there is due from the plaintiff to the defendant five hundred dollars, as alleged in his plea (or, notice of set-off or cross-claim) It is therefore considered by the court that the said sum of five hundred dollars found for the defendant be set off against that amount of the plaintiff's debt, and that the plaintiff recover of the defendant five hundred and fifty dollars, and also the costs of this suit

If the defendant's demand exceeds the plaintiff's, the entry is as follows:

No. 4. Set-off: Judgment for Defendant's Excess.

Say that the plaintiff's debt of one thousand dollars and fifty dollars interest thereon remains due and unpaid by the defendant, and that there is due from the plaintiff to the defendant the sum of two thousand dollars, as alleged in his plea of set off, together with the sum of fifty dollars interest thereon It is therefore considered by the court that one thousand and fifty dollars of the sum so found for the defendant be set off against the plaintiff's debt, and that the defendant recover of the plaintiff the excess of one thousand dollars and also the cost of this suit

If the plaintiff fails to establish any part of his demand, and the defendant succeeds on his cross-demand, the entry should be as follows:

No. 5. Set-off: Judgment against the Plaintiff.

Say there is nothing due the plaintiff from the defendant, and that there is due the defendant from the plaintiff the sum of one thousand dollars, as alleged in the defendant's plea of set-off, and the further sum of fifty dollars interest thereon It is therefore considered by the court that the defendant recover of the plaintiff the said sum of one thousand and fifty dollars, and also the costs of suit[7]

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7. Contrary to the general rule, the defendant may recover in Tennessee on his set-off or cross-demand, although the plaintiff fails to show anything due him from the defendant. Shan Code, § 5973. In each of the foregoing forms, Nos 3 and 4, judgment for all the cost is given for the party entitled to an execution It has been decided in Tennessee, in Boothe *v.* Cowan, 5 Sneed, 354, that if the plaintiff and defendant each establishes his demand, each recovers costs against the other, no matter in whose favor the execution

No. 6. Damages on Contract.

Say they find the issues in favor of the plaintiff, and assess his damages for the breach of the contract sued on to one thousand dollars. It is therefore considered by the court that the plaintiff recover of the defendant one thousand dollars damages and the costs of the suit.

No. 7. For one Defendant and against Another.

Say they find the issues in favor of the defendant A B., and in favor of the plaintiff against the defendant C. D, and they assess his damages against the said C. D to one thousand dollars for the breach of contract alleged in the declaration. It is therefore considered by the court that the defendant A B. go hence and recover of the plaintiff the costs herein accrued as to said A. B, and that the plaintiff recover of the defendant C. D one thousand dollars damages, and the balance of the costs herein accrued.

No. 8. Damages on Tort for Plaintiff.

Say they find the issue (or, issues) for the plaintiff, and assess his damages to one thousand dollars for the matters alleged in the declaration (or, say they find the defendant guilty of the matters alleged in the declaration, and assess the plaintiff's damages by reason thereof, to one thousand dollars) It is therefore considered by the court that the plaintiff recover of the defendant one thousand dollars damages, and the costs of suit.

No. 9. Plea of Usury.

Say they find that the note sued on is usurious to the amount of one hundred dollars, and that there is due to the plaintiff five hundred and fifty dollars thereon, of debt and lawful interest It is therefore considered that the plaintiff recover of the defendant said sum of five hundred and fifty dollars, and all costs.

No. 10. One Issue for Plaintiff, and One for Defendant.

Say the defendant did contract (promise, covenant, agree, etc, as the case may be) with the plaintiff as the declaration alleges, but

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issues This decision, however, was upon a construction alone of the Act of 1794, chap. 1, § 74 (§ 3021, M & V), and did not notice the Act of 1851–1852, chap 259, § 2 (§ 3632, M & V) And the like rule was declared in Maupin *v* Whitsen, 2 Heisk 2, in which neither of the above-mentioned statutes are referred to, but the decision is made expressly "*upon principle as well as upon the universal rule of courts of law*" It is believed these decisions would have been otherwise if the attention of the court had been called to the Act of 1851–1852 But if these decisions settle the law, the entries should be changed at the conclusion by saying "The defendant will recover of the plaintiff the costs accrued in sustaining the set off, and the plaintiff will recover of the defendant the balance of the cost."

they find the plea of accord and satisfaction (release, payment, etc.), in favor of the defendant It is therefore considered that the defendant go hence and recover of the plaintiff the costs herein accrued.

No. 11. In Detinue. For Plaintiff.

Say they find the issue in favor of the plaintiff, and assess his damages for the detention of the said horse by the defendant to two hundred dollars, they also find that the horse is worth three hundred dollars It is therefore considered by the court that the plaintiff recover of the defendant two hundred dollars damages for the detention aforesaid, that he recover said horse, or the value of said horse as assessed by the jury, if possession is not obtained, and also costs of this suit

No. 12. In Replevin. For Plaintiff.

Say they find the issue in favor of the plaintiff, and assess his damages for the detention by the defendant of the horses (mules, or goods and chattels) sued for to the sum of one thousand dollars Therefore it is considered by the court that the plaintiff recover of the defendant one thousand dollars damages, and also the costs of this suit

No. 13. In Replevin. For Defendant.

Say they find the issue in favor of the defendant, and assess his damage for the detention of the mules (horses, goods, etc.), from him by the plaintiff to one hundred dollars, and they find the value of said mules (horses, goods, etc.) to be three hundred and fifty dollars, to wit the black mule, one hundred dollars, the bay mule, fifty dollars, and the red mule, two hundred dollars It is therefore considered by the court that the plaintiff return said mules to the defendant, and if he fail to do so, that the defendant recover of him the value thereof as found by the jury, and it is further adjudged that the defendant recover of the plaintiff the sum of one hundred dollars damages for the detention thereof, and also the costs of this suit

No. 14. In Ejectment. General for Plaintiff.

Say they find the issue in favor of the plaintiff, and assess his damages to one dollar for the detention of the premises sued for It is therefore considered by the court, that the plaintiff recover of the defendant the premises specified in his declaration, and one dollar, the damages assessed, and also the costs

No. 15. For a Specified Part.

Say they find the defendant guilty of withholding from the plaintiff that part of the land described in the declaration, which is included in the following boundaries (or, which is known as the Hermitage place), beginning at a beech marked A, etc (describing the boundaries); and as to the residue of the premises, they find

the defendant not guilty, and they assess the plaintiff's damage for the detention by the defendant of the part above described, to one dollar. It is therefore considered by the court that the plaintiff recover of the defendant that part of the land which he is found guilty of withholding from the plaintiff as above described in the verdict, and one dollar as damages for the detention thereof, and also the costs, and that as to the residue he go hence

No. 16. For an Undivided Share.

Say they find the plaintiff entitled to one undivided fourth part of the land described in the declaration, and that the defendant is guilty of withholding that part from him, and they assess the plaintiff's damage therefor to one dollar, and as to the balance of the premises, they find the defendant not guilty Therefore the court adjudges that the plaintiff recover of the defendant the one undivided fourth of the premises sued for, and one dollar damages, and also the costs herein accrued, and that as to the balance, the defendant go hence.

No. 17. Specifying Plaintiff's Interest.

Say they find the plaintiff entitled to the premises sued for for the term of ten ·rs, from the 1st day of January, 1887, and that the defendant i ,uilty of withholding them from him, and they assess the plaintiff's damages to one dollar It is therefore adjudged by the court, that the plaintiff recover of the defendant the possession of the premises sued for, for the residue of his term of ten years, from 1st January, 1887, and his damages of one dollar, and also the costs of suit Or it may be "entitled to the premises during his life," or, "the life of A. B.," or, "during her life or widowhood."

No. 18. Tort. Release.

Say the defendant is guilty of the matters charged in the declaration, but they find the plea of release in favor of the defendant, etc. It is therefore, etc.

There are some cases where no more costs than damages are recovered, and in such cases the entry would be as follows:

No. 19. No more Costs than Damages.

Say they find the issue in favor of the plaintiff, and assess his damages to one dollar. It is therefore considered by the court that the plaintiff recover of the defendant one dollar as his damages, and one dollar of his costs, and as to the balance of the costs, it is adjudged that each party pay his own costs, and judgment is rendered against each, in favor of the other, for the same.

§ 36. It has before been stated that the judgment must pursue the verdict, as, if the verdict be against one, the judgment cannot be against two, or, if the verdict be for a specific sum, the judgment cannot be for a different sum. But there may be judgment *non obstante veredicto,* that is, *notwithstanding* the verdict. This right would exist in a case where the verdict is in favor of the defendant upon a plea of confession and avoidance, and the matter relied upon in avoidance is insufficient in law to bar the plaintiff's action The plea confesses the declaration, and rests the case on the matter of avoidance, and that being insufficient, the confession stands in full force, and entitles the plaintiff to judgment, notwithstanding the verdict. The judgment is obtained on motion, and a writ of inquiry would be awarded in all cases where necessary, as in a judgment by default The form of entering such a judgment would be as follows:

Entry. Judgment, Non Obstante Veredicto.

Came the parties, and, on motion of the plaintiff, it is considered by the court that the verdict and judgment in favor of the defendant be set aside, and that, notwithstanding the verdict, the plaintiff recover of the defendant one thousand dollars, the debt mentioned in the declaration, and fifty dollars, interest thereon, and also the costs of the suit.

If the action sounds in damages, then say: "recover of the defendant his damages, to be assessed by a jury at the present term of this court."

CHAPTER X.

PROCEEDINGS FOR THE CORRECTION OF ERRORS.

§ 1. In the preceding chapters of this volume the history of a lawsuit has been given from its inception to final judgment If the party against whom the judgment is rendered does not choose to contest the matter further the next step would be an execution, or such other final process as the nature of the case would demand. But the losing party may be dissatisfied with the judgment; there may have been errors committed against him, and the law furnishes him with other instrumentalities, by the use of which he may still carry on the war. In this chapter it is proposed to discuss the various proceedings in courts of law for the correction of errors. Such relief may be obtained in one or more of the following modes: 1. By a writ of error *coram nobis* 2. By a new trial 3. By arrest of judgment. 4. By appeal. 5. By appeal in the nature of a writ of error 6. By writ of error. 7. By *certiorari* These several remedies will be noticed in the order named.

CORAM NOBIS.

§ 2. Any person aggrieved by the judgment of the Circuit Court, because of a *material error of fact,* may reverse the same upon writ of error *coram nobis,* provided the error occurred in one or the other class of cases presently to be mentioned. The writ of error *coram nobis* does not complain of any error in law, it admits that, according to the facts as they appear on the record, the judgment is correct; but the ground of complaint is that the facts stated are false, or there is a fact which is neither

affirmed nor denied on the record that makes the judgment erroneous.

The mere existence, however, of a material error of fact is not sufficient to justify a resort to this writ. There are other remedies, more in the usual course of procedure, which the party is not at liberty to overlook in the correction of errors. If he be present in court, capable of acting for himself, and in no way *prevented* from making his defense, relief under this writ would be refused Very nearly, if not altogether, in accord with the common-law rule, the statute of Tennessee has restricted the relief by writ of error *coram nobis* to three cases.[1]

The *first* of these cases is where the party asking the writ *had no notice* of the proceedings in which the judgment complained of was rendered This provision is doubtless intended for that class of cases in which a judgment may be legally obtained without notice or process to bring the defendant before the court In a succeeding chapter, on the subject of summary remedies, it will be seen that judgments may be taken many times upon motion only, and without process or other notice to the party. If the proceedings be of a character requiring the use of process, and judgment be taken against the defendant, without service of process, or something done as a legal substitute for service, this would be error of *law*, apparent on the face of the record, and would be correctible by writ of error, and not by the writ *coram nobis*.[2] And again, if in such a case the process appears to have been issued and served on the defendant, but the *fact* is otherwise, this would furnish no ground for the writ of error *coram nobis*, according to the principles of the common law. The reason for this is said to be that the sheriff's return on the writ, showing service, is a part of the record, and

1. §§ 3829, 3830, M & V
2. Patterson *et al* *v* Arnold, 5 Coldw 368, Brandon *v* Diggs, 1 Heisk 476

a party cannot assign as error that which contradicts the record.[3] If it should appear, however, that the sheriff acted fraudulently, or innocently committed a mistake in making the false return, it is perhaps true that the case would then fall under the third class of cases to be presently referred to in which relief by this writ would be granted. But, if the common-law principle is to control, then the only remedy at law in such a case would be an action against the sheriff for a false return.

The *second* case to which the writ of error *coram nobis* is applicable as a remedy, is where the party was prevented by *disability* from showing or correcting the error of fact complained of. Disability in this connection means the want of legal capacity to do a thing. Infants, married women, and insane persons want legal capacity to prosecute or defend suits, without guardians, next friend, or husband, it is certainly so in regard to the two former, and ought to be so in regard to the latter. If a judgment is obtained against an infant, and his infancy does not appear of record, he may reverse it by writ of error *coram nobis* when he comes of age, or by his guardian or next friend during his minority. If his infancy appears of record, the judgment may be reversed by a writ of error in the Supreme Court. If the plaintiff or defendant was a married woman at the time of commencing the suit, she alone, if her coverture is dissolved, or jointly with her husband if it continues, may have the writ. If the plaintiff or defendant died before judgment, his representative may have the writ.[4]

The *third* case in which this writ may be used is where the party was prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his

3. Bac Abr., Error K. 3, Crawford *v* Williams, 1 Swan, 346; Bolling *v* Anderson, 1 Tenn Ch. 135

4 Bac Abr, Error K 3, Crawford *v* Williams, 1 Swan, 346; Bolling *v.* Anderson, 1 Tenn. Ch 135; Tidd Pr. 1137, 1169.

part. If he were present defending, the remedy would be a new trial or appeal in error. The discovery of evidence after the judgment, which would have sustained the defense had it been known, is no ground for the writ. If it were, there would be no safety in the judgments of the courts. Future developments, pretended or real, would expose them to continual jeopardy. The fraud of the other party, or probably of anybody else, accidental inability, and many other circumstances coming within the general description of surprise, accident, etc., would sustain the proceeding[5]

In either one of the three cases in which the writ is allowed, it may be stated generally that the party seeking the remedy must make it appear that it was not by reason of his negligence that the fact concerning which the error complained of was committed, was not shown on the former trial. For if, by the exercise of all reasonable diligence and care, he could have availed himself of the fact on the former trial, the writ will be denied him. And again, the error in fact which will render the judgment erroneous must be such as would have precluded the rendition of such judgment if the fact had judicially appeared at the trial.[6]

§ 3. The writ is obtained by petition presented to the judge at chambers or in open court[7] "At chambers" means out of court, either during the term, or in vacation. This petition is to be sworn to.[8] The Code of Tennessee does not require it expressly, but it is a general rule in regard to applications based on facts to set aside any ac-

5 Bingham *v* Brewer, 4 Sneed, 436

6. Brandon *v* Diggs, 1 Heisk 472, Memphis Sav Inst *v* Hargan, 9 Heisk. 497; Dunnivant *v* Miller, 1 Baxt. 227, Mahalovitch *v* Vaughan, 1 Baxt 325, Dinsmore *v* Boyd, 6 Lea, 689

7. § 3824, M & V.

8 If sworn to by an agent, it must appear in the affidavit or petition that the facts are peculiarly within the knowledge of such agent Reed *v* Hoffman, 6 Heisk 441.

tion of the court, or to obtain any extraordinary process. The application is to be made within one year from the date of the judgment; at least, the Code of Tennessee says, "it may be had" within that time.[9] But what if the petitioner did not within that time know of the existence of the judgment? What if he was an infant, and has come of age more than one year after the rendition of the judgment? Or a *feme covert,* and her disability continued more than a year, and is now removed? Or the party was dead, and his representative is to apply for the writ? There was formerly no such limitation.

If the judge considers the facts sufficient to warrant it, he orders the clerk to issue the writ He may order it to operate as a *supersedeas* or not.[10] It is to be inferred if he simply orders a writ of error *coram nobis,* that it will not operate as a *supersedeas.* He is to judge from the petition whether a *supersedeas* is warranted by the facts or not, and if he thinks it is, he orders that the writ so operate, or, what is the same thing in a more intelligible form, he orders the clerk to issue a *supersedeas* to the sheriff to stop the execution. For it is not supposed that any writ of error would actually issue. To whom would it be directed, or what would be its command? It is spoken of as a writ of error only as a name given to a proceeding instituted to reverse a judgment on alleged errors of fact. Neither the writ of error nor the writ of error *coram nobis* actually issues in practice. But a *supersedeas* does whenever it is desired to stop the execution. To obtain it, the petitioner must give bond with good security in double the amount of the judgment, conditioned to abide by and perform the judgment of the court.[11] If he only obtains a writ of error, he gives bond

9. § 3824, M & V, Elliott *v* McNairy 1 Baxt 347
10. § 3824, M & V, Elliott *v* McNairy, 1 Baxt. 347.
11. § 3825. M & V

and security for nothing more than costs and damages, and the execution runs on.

§ 4. Notice that the writ is sued out is to be served on the opposite party or his attorney at least ten days prior to the term of the court to which it is returnable.[12] By the former practice, in Tennessee, notice had to be given to the opposite party of the intended motion for the writ; it was granted only in open court on motion after due notice (*a*) The practice now established is first to grant the writ on petition, making it returnable to a subsequent term, and then give notice of its issuance and of the term to which it is returnable The *supersedeas,* which would be the only writ really issued, would be returnable to the next term also. The only consequence of not giving notice as much as ten days before the return of the writ, would be that the case would not stand for trial until the succeeding term, unless by consent of the party entitled to notice As to nonresident defendants who have no known attorney in the State, the court may order publication to be made in order to give them notice.[13]

§ 5. On the return of the writ the adverse party may move to dismiss it on the ground of the insufficiency of the facts stated in the petition [14] It is to be presumed he has made out the best case he has against the judgment complained of; and if that is not sufficient, the proceeding should go no farther. Upon a simple writ of error, the court is bound to look into the whole record, and give judgment upon any error that may appear, whether assigned as error by the plaintiff or not But in this proceeding no errors appear on the record; they are facts, and are all to be presented by the petitioner; and the court

12. § 3825, M & V.
(*a*) 1 Swan, 341
13 § 3828, M & V
14 Elliott *v* McNairy, 1 Baxt. 346· Jackson *v* Milsom, 6 Lea, 515, Gallena *v.* Sudheimer, 9 Heisk 189.

has no means of knowing of any others than those stated. If the motion is not successful, or is not made, the petition has performed its work, and need be no further noticed.

§ 6. Upon the return of the writ, the next step for the petitioner is to assign errors. This is a statement in the nature of a declaration of the facts relied upon to reverse the judgment. These facts are already stated in the petition, but that will not do as a substitute for an assignment of errors, and it is erroneous to try the case upon an issue on the petition The petition is treated as a mere proceeding to get the case into court, and is *functus officio* as soon as it accomplishes that end. The court may prescribe rules for the assignment of errors, making issues thereon, and for all such other matters as may be necessary to give full effect to this proceeding. The plaintiff is not restricted to the errors set out in the petition in his assignment of errors He may state the existence of other facts as grounds of reversal The fact that he cannot use the petition as a declaration, but must assign anew, implies such right

To the assignment of errors the defendant answers as he would to a declaration. He may demur or plead by way of denial or avoidance. To the latter the plaintiff may reply or demur. And thus the parties come to an issue either of law or of fact [15]

If the issue be one of law, it is of course tried by the court If it be an issue of fact, it also would now be tried in Tennessee by the court, unless the parties called for a jury in the manner heretofore explained.[16]

If the cause is not tried at the first term after the writ is sued out, the *supersedeas* may be discharged; and then the execution will run on the original judgment, and the money may be collected while the parties are

15. Crawford *v* Williams, 1 Swan, 341.
16. Crawford *v* Williams, 1 Swan, 341.

litigating the writ of error. It requires, however, the oath of the party denying the facts alleged in the petition to discharge the *supersedeas*. He has also to give a bond, with good security, to perform the final judgment if it should be against him. This is called a *refunding bond*. The design of discharging the *supersedeas* is to collect the money. If the final decision is against the defendant in the petition, he will have to refund the money to the petitioner; and to secure the doing of this is the principal design of the bond.[17]

§ 7. Where the writ is dismissed without a trial on the merits, or where, upon such a trial, the decision is against the petitioner, the original judgment is affirmed, and judgment is rendered against him and his sureties in the prosecution bond for costs only, where no *supersedeas* has been obtained. But if a *supersedeas* has issued, then judgment is rendered against him and his sureties in the bond for the amount of the original judgment, and twelve and a half per cent. per annum interest thereon, and all costs.[18]

If the decision is in favor of the petitioner, then the original judgment is reversed, and judgment rendered against the plaintiff in it for all costs [19]

MOTION FOR NEW TRIAL.

§ 8. Either party dissatisfied with the verdict of a jury may, during the term at which it is rendered, but not afterward, ask for a NEW TRIAL. This remedy will now be considered. The grounds upon which a new trial may be granted are so numerous that nothing more can be done than give a general outline of the classes into which they may be arranged. It is true, as a general proposition, that where a party — without any fault of

17 § 3831, M & V 18. § 3827, M. & V.
19 Crawford *v* Williams, *supra*

his — has not had a fair trial of his case, he is entitled to a new trial.

§ 9. The parties have a right to demand a *competent* JURY for the trial of their case, and if an *incompetent* juror be taken over the challenge of either, this is ground for a new trial in favor of the party aggrieved. But a failure to challenge is a waiver of incompetency, whether the party knew of the incompetency or not. The juror being challenged, the party is not bound by his answers on the examination, and so if he denies his incompetency, and the party afterward finds that he swore falsely, this will be ground for a new trial.[20]

§ 10. The parties may *consent* to the introduction of illegal EVIDENCE, and if they do consent, they are bound by it, and a new trial will not be granted to either on that ground. But if illegal evidence be introduced *without the consent* of the opposite party, the latter may move the court to withdraw it, *although he made no objection at the time* the evidence was offered, and a refusal of such motion is ground of a new trial.[21] But the motion to withdraw the evidence must be made before verdict, for if incompetent evidence be permitted to go to the jury without objection, it is too late to except after verdict, and the rule of practice in this respect is the same in civil and criminal cases.[22]

If competent evidence is illegally rejected, or if illegal evidence objected to is admitted, it is ground for a new trial to the injured party. The court will not inquire what effect the illegal evidence admitted, or the legal evidence rejected, had; if it might have influenced the jury,

20 See generally on the subject, McClure *v* State, 1 Yerg 207; Gillespie *v* State, 8 Yerg 507, Calhoun *v* State, 4 Humphr 478, Park *v* Harrison, 8 Humphr 412, Brakefield *v* State, 1 Sneed, 215 But see Draper *v* State, 4 Baxt 253

21. Price *v.* Allen, 9 Humphr 711, Creed *v* White, 11 Humphr 551

22 Jackson *v* Dillon, 2 Tenn. 263; Ewell *v.* State, 6 Yerg 374, Williams *v* State, 3 Heisk 379.

it is a sufficient ground for a new trial [23] But if it is evident that it could have had no influence, then it is insufficient grounds [24]

§ 11. If the COURT, in charging the jury, commit a positive error, the revising court will reverse and remand for a new trial, although no exception be taken to the charge; neither the consent nor silence of counsel can make the law.[25] And so as it is the office of the judge to instruct the jury upon the law of the case, if he omits instructions where the case requires it, this is equally fatal, and a new trial should be granted [26] But if the charge substantially present the law of the case, and contain no misdirection, a failure to give a full statement of the law will not be ground for a new trial in the absence of a request for additional instructions.[27] It is error for the court to assume in the charge that certain things are facts, or that certain facts have been proved, or that the plaintiff is *entitled* to damage on account of certain facts, if proved; these are all questions to be determined by the jury, and for such an error in the court a new trial will be granted, if the assumption is of matter material and calculated to mislead the jury [28] But if no harm could have resulted to the complaining party from an error in the charge, he can have no new trial on account of it, nor is he entitled to such relief if the error be committed in his favor [29]

§ 12. A new trial is allowed on account of the MISBE-

23 Peek *v* State, 2 Humphr 88, Clark *v* Rhodes 2 Heisk 208.

24. Simpson *v* State, 4 Humphr 458, Wilson *v* Smith, 5 Yerg 409 Wilson *v* State, 3 Heisk 244

25 Weakly *v* Pearce, 5 Heisk. 424

26 Allen *v* State, 5 Yerg 456, Crawford *v* State, 4 Coldw 194

27 Sutherland *v* Shelton, 12 Heisk. 375, Nash & D R R Co *v* Jones, 9 Heisk 27

28 People's Ins Co *v* Kuhn, 12 Heisk 315, 515, L & N R R Co *v* Campbell, 7 Heisk 260, Graham *v* Bradley, 5 Humphr 476, Booker *v* Booker, 5 Humphr 502 In Malone *v* Searight, 6 Lea, 94 it is said such error should be objected to at the time

29. Steinwehr *v.* State, 5 Sneed, 590, N & C. R R Co *v* Smith, 6 Heisk 180

HAVIOR OF THE JURY. It is mostly in criminal cases that applications on this account have been adjudicated by the courts In cases of the grade of felony the jury are always kept together by a sworn officer; and if they disperse, even by the consent of the defendant, a new trial may be granted to him on conviction.[30] If, while they are in the care of the officer, either before or after they are sworn, one should casually separate from the others, so long or so far that he *might* be tampered with, it vitiates the verdict, unless it is shown on the part of the State that he was not tampered with; and the affidavit of the offending juror is not sufficient evidence of that fact[31] Having conversations with third persons, unexplained, also vitiates it[32] So will receiving statements concerning the case from one of their body[33] So will the mingling of the prosecutor with them[34] But casual and unimportant separations, talking in the presence of the court, having liquor, but not drinking too much, and other trivial occurrences, not showing any probable chance for undue influence, will not vitiate the verdict.[35]

In civil cases and misdemeanors the integrity of the jury would be guarded by the same sort, though not by the same degree of jealousy. The stimulants to the exercise of contaminating influences are not so general or so intense, and the rigor of legal rules is always mitigated or aggravated in proportion to the necessity that demands their application. Juries are always kept together during the sittings of the court, and always disperse upon its daily adjournments, unless objection is made. This of itself

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30. Wiley *v* State, 1 Swan, 257
31. Hines *v* State, 8 Humphr 597
32. Riley *v* State, 9 Humphr 646
33. Sam *v* State, 1 Swan, 61. So in civil cases Wade *v*. Ordway, 1 Baxt 243
34 McElrath *v* State, 2 Swan, 379
35 Stone *v* State, 4 Humphr 28, Vaughan *v* Dotsen, 2 Swan, 349, Riley *v* State, *supra*

shows that presumptions of improper influence are not entertained The fact that they might have been tampered with creates no presumptio that they actually were. Blackstone says if they eat or drink "at his charge for whom they afterward find; if they speak with either of the parties or their agents, after they are gone from the bar, or if they receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict [36] But as to the matter of eating and drinking, and speaking with the parties, the rule thus declared by Blackstone has been relaxed in later times. If these things should now occur by inadvertence, or without any improper design, and it can be safely assumed that the mind of the juror was not influenced thereby, no reasonable or just ground to disturb the verdict would be held to exist.(*a*)

If the jury resort to experiments to determine the credibility and weight of testimony, instead of deciding it by their estimate of the character of the witnesses, and the probability of their statements, the verdict may be set aside.[37] An agreement that each juror shall put down the amount of damages he is willing to give, and divide the aggregate by twelve, and give the product as their verdict, will vitiate it. But if there is no agreement beforehand to be bound to give the amount so produced, but it is given because it is satisfactory to all, it is good [38]

A new trial is not granted for excessive damages, unless they are so flagrantly extravagant as to indicate partiality, or passion, or corruption.[39] And the court may, in its

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36 3 Bl Comm 375

(*a*) 2 Swan, 349

37 Jim *v.* State, 4 Humphr 289.

38 Harvey *v* Jones, 3 Humphr 160, Tinkle *v* Dunivant, 16 Lea, 503

39 Boyers *v* Pratt, 1 Humphr 91, Moore *v* Burchfield, 1 Heisk. 204, Tinkle *v* Dunivant, 16 Lea, 503.

discretion, avoid the necessity of giving a new trial, by suggesting to the plaintiff that he release a part of the damages, which may be done, and the damages thereby brought within reasonable bounds.[40]

The affidavits of jurors to their own misconduct or to that of their fellow-jurors, or to any facts occurring among themselves to vitiate their verdicts, are not received in England on a motion for a new trial, and in many of the United States the same rule prevails. It is a discrediting of the juror himself in many cases, and in all it exposes jurors to be tampered with after the verdict, and renders verdicts insecure. In Tennessee they are received to a limited extent.[41] Any positive misconduct of the jurors may be thus shown, any extraneous influences or improper processes by which the verdict was obtained. But they are not admissible to show that the affiant himself, or any or all of the jury, founded the verdict or gave their assent to it upon any mistaken view of the law as charged by the court, or of the evidence, as, that they were governed by illegal evidence or frivolous circumstances.[42]

Besides the dangerous tendency of admitting affidavits of jurors as to the views of law or evidence on which they acted, there can be no practical purpose subserved by hearing them. If the verdict is in accordance with the law and the evidence, it ought to stand, if not, it ought to be set aside.[43]

§ 13. If the VERDICT IS AGAINST THE LAW as charged by the court, it will be set aside, unless the court should be convinced that the charge was erroneous and

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40. Branch *v* Bass, 5 Sneed, 366

41. Crawford *v* State, 2 Yerg 60, Booby *v* State, 4 Yerg 111, Hudson *v* State, 9 Yerg 61, Norris *v* State, 3 Humphr 336, Cochran *v* State, 7 Humphr 547, Nelson *v* State, 10 Humphr. 533, Galvin *v* State, 6 Coldw 287

42. Wade *v* Ordway, 1 Baxt 235, Richardson *v* McLemore, 5 Baxt 590, Rollu *v* Bachman, 5 Lea, 159

43 Saunders *v* Fuller, 4 Humphr 518.

the verdict is really consonant with the law. It is sometimes said in the books that where justice has been done, the verdict, though against law, will not be disturbed Blackstone expresses the true sense and spirit of the rule on that subject in these sentences: "A new trial is not granted where the value is too inconsiderable to merit a second examination It is not granted on nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus,* where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience.[44]

§ 14. *In the trial* of a case it is the exclusive province of the jury to judge of the FACTS; but when the trial is over, and either party asks another hearing, it is the exclusive province of the judge to determine whether their finding is justified by the evidence. The applicant for a new trial is asking a remedy allowed him by law for an alleged wrong done him by the jury, and the judge is bound to grant that remedy if he is satisfied the wrong has been done No matter whether the wrong consists in a disregard of the law charged by the court, or of the evidence delivered by the witnesses, the court must give the injured party his only legal remedy.

The rule in Tennessee makes it the duty of the circuit judge to grant a new trial whenever, in his opinion, it is against the weight of evidence or contrary to law, and he cannot refuse it, to save time or avoid the expense of another trial.(*a*) If the circuit judge, however, is satisfied with the verdict, his action in refusing a new trial will not be reversed on the facts in the Supreme Court unless the evidence *greatly* preponderates against the verdict.[45]

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44 3 Bl Comm 392

(*a*) Turner *v* Turner, 1 Pickle, 387

45 Tate *v* Gray, 4 Sneed, 592, Nailing *v* Nailing, 2 Sneed, 632; Nance *v* Haney, 1 Heisk. 181, L. & N. R. R. Co. *v.* Connor, 9 Heisk 25.

§ 15. If a party is SURPRISED by the introduction of evidence, and can show that he has suffered injustice from it, which would likely be remedied by another trial, this is ground for a new trial.[46] Surprise at the admission or rejection of evidence by the court will not be sufficient ground, unless under peculiar circumstances. If the action of the court is legal, the party ought to have anticipated it.[47] If it is illegal, he bases his motion on the ground of the admission or rejection of illegal evidence. But where the opinions of the court, as avowed in a former stage of the case, have misled the party, and on that account he is surprised by the present action of the court in receiving or rejecting the evidence, he may have a new trial.[48]

The party may have been surprised by his case coming on sooner than he expected, and thus taking him unprepared. This is not sufficient cause for a reinvestigation. Parties must be present, prepared to try or continue as their cases are reached on the docket, and if they are not, they must abide the consequence of their negligence.[49]

The affidavit of the party is sufficient evidence of the mere fact of surprise, unless the court see from the facts developed in the case it could not be so. But surprise alone is not sufficient His affidavit must show by what testimony the evil can be remedied in another trial, and the affidavit of the witness relied on must accompany his own, or some affidavit or evidence showing a probability that such evidence may be had.[50] And still, if the court is of opinion that another trial would result in the same verdict, the motion will be overruled.[51] It would be use-

46 3 Bl Comm 390

47 Nane *v* Simpson, 5 Sneed, 612, Morgan *v* Winston, 2 Swan, 472. Turnley *v* Evans, 3 Humphr 222

48 Morrow *v* Hatfield, 6 Humphr 108

49. McAuly *v* Lockart, 4 Humphr 229, Smith *v*. Jones, 3 Sneed, 534 Simonton *v* Buchanan, 2 Baxt 279

50 Riley *v* State, 9 Humphr 656

51 Turnley *v* Evans, 3 Humphr 224.

less to grant a new trial unless there was a probability of a different result.

§ 16. EVIDENCE DISCOVERED since the trial or during its progress, too late to have had it before the jury, is sufficient ground for a new trial The party's affidavit of the new discovery must be adduced, together with the affidavit of the witness, or some other satisfactory evidence of the existence of the testimony. The evidence must be material, and such that it might change the result of the trial. If the court can perceive no likelihood that a different verdict would be produced, it will repel the application. If there was evidence to the same fact, and what is now discovered is merely cumulative, it can hardly be sufficiently certain that a different finding would be effected by it And not only must the evidence be newly discovered, material, proved to exist, and not cumulative in its character, but the party will still forfeit his claim to a new trial if it appears he has been guilty of negligence in not ascertaining the existence of the evidence and having it before the jury [52]

§ 17. New trials may be granted upon other grounds The principle is that where justice is not done upon one trial the injured party is entitled to another [53] But if he has brought the injustice he complains of upon himself by his own negligence, there is no remedy for him. The municipal and the moral law alike visit the want of diligence with punishment.

§ 18. Not more than two new trials shall be granted to the same party in an action at law or upon the trial by jury of an issue of fact in equity.[54] But this rule has been limited by judicial construction to new trials on ac-

52. Cozart *v* Lisle, Meigs, 65· Turnley *v* Evans, *supra;* McGavock *v* Brown, 4 Humphr 251 Kincaid *v* Meadows, 3 Head, 193 Luna *v* Edmiston, 5 Sneed, 160, Haybour *v* Rayburn, 7 Yerg. 436

53 3 Bl Comm 388.

54 § 3835, M & V.

count of the verdict being against the weight of evidence, and any number of new trials may be granted on account of illegality in conducting the investigation, error in rejecting or admitting evidence, or in charging the jury, misconduct in the jury, the verdict ' g against the charge of the court, or other like causes. It is not expressly decided whether or not a third new trial might be given on the ground of surprise or newly-discovered evidence, but perhaps it would be refused where the former verdicts were not imputable to the errors of the court or the misconduct of the jury or the adverse party

§ 19 Blackstone remarks that the granting of a new trial being a matter of sound discretion, the court may impose upon the applicant all such equitable terms as his antagonist shall desire, and mutually offer to comply with such as the admission of facts not intended to be litigated, the production of papers, and the like.[56] It is called a matter of sound discretion in the court, not because the court may arbitrarily grant or refuse it, but because it is not a matter of strict right, like the party's right to the first trial, it does not belong to the regular, "due course of law," but it is an interruption and suspension of the regular course of a lawsuit; and if it be granted improperly or without sufficient cause, the appellant may assign this as error, for which the Supreme Court shall have power to reverse.(*a*)

When the cause alleged is the error of the court or jury, or the wrong of his antagonist, it would not seem equitable to impose terms; at least, it would have to be a very strong case of iniquitous adherence to a hard legal advantage. And in no case has it been the practice of our courts to exact any other terms than the payment of costs,

55 Trott *v* West, 10 Yerg 500, Burton *v* Gray, 10 Lea, 580, 2 Lea, 312 1 Head, 169; 1 Humphr. 16

56. 3 Bl Comm 392

(*a*) §§ 3836, 3837, M & V , 10 Lea, 531, 13 Lea, 234, 3 Pickle, 494

either of the trial term, or all that have previously accrued in the suit.

§ 20. The motion should be entered on the minutes whenever made, which may be the next morning after the verdict is rendered, or at any subsequent day of the term. It is not proper to make the motion as soon as the verdict is rendered. It would generally be offensive to the jury, and an interruption of the regular course of business. The formal style of the motion in England is for a rule in behalf of the applicant to show cause why a new trial *should* be granted; in Tennessee it is for a rule on his antagonist to show cause why it *should not* be granted, and the entry is for a rule accordingly But the simpler form, and the one which more aptly expresses the idea, is that the party moves for a new trial, and if the court does not at once grant it, it is entered thus:

A B
v
C D

The plaintiff (or, defendant) moved the court to grant him a new trial

When afterward it is granted, enter it thus:

A. B
v
C. D

Came the parties, and on argument the plaintiff's motion for a new trial is granted

If granted when made, the entry may be thus: "On motion of the plaintiff, a new trial is granted him."

It is proper to state further the cause for which the new trial is granted, because if two new trials are granted to the same party, and the record does not show for what cause, it will be presumed that they were granted for such a cause as precludes the court from granting a third trial to the same party.[57] It may therefore be added to the

57. Ferrell *v* Alden, 2 Swan, 78

last entry, "for error in the charge of the court," or, "because the verdict is against the charge of the court," or, "on account of misbehavior in the jury," or whatever else may be the cause If costs are given, add: "on payment of the costs. It is therefore adjudged that the defendant recover of the plaintiff the costs."

If the application for a new trial is refused, the entry will be thus:

The plaintiff moved for a new trial, which motion is by the court overruled, to which the plaintiff excepts

§ 21. If a new trial is granted, the cause stands for trial in the next term, preserving its same place on the docket. It is to be tried as if it never had been tried before. The same depositions may be read, but the witnesses must be resummoned. No advantage is to be taken by the one party of the former verdict in his favor, and none by the other party of the judgment of the court setting aside the verdict, and awarding a new trial.[58]

ARREST OF JUDGMENT.

§ 22. If the defendant fails in his motion for a new trial, he may yet move in ARREST OF JUDGMENT, that is, that the judgment for the plaintiff be arrested, or withheld on the ground of error appearing on the face of the record. If the declaration does not show a good cause of action, the judgment may be arrested as if the action be upon a parol contract, and the declaration fails to state the consideration, or against the indorser on a promissory note, and the declaration fails to state demand of the maker and notice to the indorser.[59] But in some cases the defect in the declaration is cured by the plea If the plea

58 3 Bl Comm 391

59 Steph Pl 96; Shelton *v.* Bruce, 9 Yerg 24, Knott *v* Hicks, 2 Humphr 162

states the fact which the declaration omits, this cures the defect, and in other cases the verdict will cure the defect although the plea does not.[60] An entire omission to state facts showing a cause of action is not cured by verdict, for in such case there would be no ground or foundation on which to render judgment, but a defective or imperfect statement of such facts not objected to before verdict is cured by it.[61] It is alone for material defects that the judgment may be arrested. It will not be done for matters of form, for these may be cured by amendments in favor of the judgment by the court rendering it, or by the court to which it may be removed if substantial justice requires it.[62]

Motions in arrest of judgment usually come from the defendant, but if on a plea of set-off the verdict be against the plaintiff, there is no reason why he should not be allowed the same relief and on like principles with the defendant. If the plea of the defendant be insufficient, and the verdict of the jury is against the plaintiff, the remedy of the plaintiff is not in arrest, but a motion for judgment notwithstanding the verdict, which has heretofore been explained.[63]

REPLEADER.

§ 23. Before proceeding with the discussion of the next mode of correcting errors in the regular order announced in the opening of this chapter, motions for a REPLEADER will be briefly noticed. This arises where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was an *immaterial* issue, and hence no matter which way found is not decisive of

60 Steph Pl 147, Witcher *v.* Richmond, 8 Humphr 474

61. Anderson *v* Read, 2 Tenn 208, Reed *v* Gas Co, 9 Heisk. 545, Rogers *v.* Love, 2 Humphr 417, Cannon *v* Phillips, 2 Sneed, 186

62 § 3583, M & V

63. § 3578, M & V.; Caldwell *v.* State, 2 Sneed, 490.

the case. In such case, the court, not knowing for whom to give judgment, will set aside the verdict and award a repleader, that is, will order the parties to plead *de novo* for the purpose of obtaining a better issue.[64] But this relief is not granted to the party who committed the first fault in pleading. If the issue, although immaterial, be found against him, he is barred by it and judgment will be rendered.[65] So that now the cases must be very limited in number and kind where a repleader will be awarded, or where it would be considered a necessary resort. If the verdict is in favor of the defendant on an immaterial issue, the plaintiff has no use for a repleader, for he can have judgment notwithstanding the verdict, and if the verdict on such plea be for the defendant, he is not, under the above rule, entitled to a repleader. And so if the plea denies an immaterial allegation in the declaration, and verdict be for the defendant, the plaintiff does not need a repleader, for under the rule that what is not denied is confessed, the plaintiff may have his judgment. And so again in such case the defendant being in fault, if the verdict be against him, he would not be entitled to a repleader. A repleader does not often occur in practice, and it is not necessary to notice the subject further.

APPEAL.

§ 24. If the motions for a new trial and in arrest of judgment are refused, the only remedy left the aggrieved party is to remove the case to the Supreme Court, and this presents next in the order of discussion the remedy by APPEAL.

Strictly an appeal is not a remedy for the *correction of errors*, but is the mode by which causes are removed from

64. Steph Pl 99

65 Bledsoe *v* Clouning, 1 Humphr 85, Nixon *v* Bullock, 9 Yerg. 416 The Supreme Court will not remand for a repleader Gass *v.* Mason, 4 Sneed, 509.

a lower to a higher court for *retrial both on the facts and the law* of the case. The effect of the appeal is to annul and make void the judgment appealed from. So that nothing remains in the lower court. The suit, the same suit, is simply prosecuted in a different forum. What may have occurred in the lower court is not brought to the higher for *review* or *correction*. What was done below is abrogated by the appeal, and the case is in the appellate court to be tried as if it had been commenced there.[66]

In Tennessee an *appeal* from the decision of a justice of the peace is to the Circuit Court. The justice's judgment is abrogated thereby, and the trial is *de novo* in the Circuit Court.[67] So *appeals* are allowed from the County Court to the Circuit Court, and if it be a jury case, it is tried *de novo* in the latter court; and if it be a proceeding in the nature of a chancery case, it is *reheard* as if *the proceedings had commenced in the Circuit Court.*[68] So *appeals* are allowed from the Circuit and Chancery Courts to the Supreme Court, where the case *is a matter of equity* tried according to the forms of the Chancery Court, and in such cases there shall be a *re-examination* in the Supreme Court of the *whole matter of law and fact* appearing in the record.[69] But nowhere is it provided that an *appeal* may be taken from the judgment of a Circuit Court when proceeding according to the course of the common law. It applies only where the proceedings are in the nature of equity cases, and are conducted according to the rules of the Chancery Court

If a simple appeal is prayed from the judgment of a

66. Suggs *v.* Suggs, 1 Tenn 2; Furber *v.* Carter, 2 Sneed, 3, Dossett *v.* Miller, 3 Sneed, 73; Maskal *v* Maskal, 3 Sneed, 208; Calchrist *v.* Cannon, 1 Coldw 590, Smith *v.* Holmes, 12 Heisk 468.

67 Allen *v* Wood, 1 Head, 437.

68 § 3869, M & V

69 §§ 3872–3874, M & V. A simple appeal is the only mode of correcting errors in a divorce suit § 3875, M. & V.

Circuit Court, and the cause is thus carried to the Supreme Court, that court will regard the case as having been removed from the lower court by an appropriate proceeding, that is, by an appeal in error or by writ of error.[70]

But although treated as an appeal in error, still it will be of no benefit to the appellant in the Supreme Court, unless there is error on the face of the *technical record*, and the technical record consists only of the process, pleadings, and entries on the minutes, including the entry of the verdict and judgment.[71] Even the written contract, which constitutes the foundation of the action, is not a part of the record, unless it is set out on oyer craved, or made a part of the record by bill of exceptions.[72] If there be an error apparent on the face of the technical record, as if a demurrer be improperly overruled, or the verdict be not responsive to the issue or too vague to be carried into execution, and the like, then, the cause being in the Supreme Court as by appeal in error, the court will correct the error, and remand the cause for retrial in the lower court, or in proper cases pronounce there the judgment which should have been pronounced below.

Where the error is apparent on the face of the technical record, a motion for a new trial is not a prerequisite to the removal of the cause to the Supreme Court, nor is a bill of exceptions necessary. But if the error relates to any other matter, as that the verdict is not supported by the evidence, the misconduct of the jury, the ruling of the court on the evidence, the instructions or charge of the court to the jury, etc., the Supreme Court will not reverse, unless the court below has been asked to correct the error by a motion for a new trial, and has refused to do so; and in such cases a bill of exceptions is necessary,

70 Porter *v.* Wheaton, 5 Yerg 108, § 3575, M. & V

71. Allen *v.* State, Mart & Y 295

72 Union Bank *v.* Love, Meigs, 225; McConnell *v* Read, Mart. & Y 225; Williams *v.* Hubbard, 7 Humphr. 255.

for in no other way can such errors be made to appear, or become parts of the record.[73]

It is not necessary to discuss further the remedy by appeal, as it must be seen it is not a resort for the *correction of errors* in the Circuit Court when that court is proceeding according to the course of the common law.

APPEAL IN ERROR.

§ 25. The next mode of removing a cause from the Circuit Court to the Supreme Court is by appeal in the nature of a writ of error. For the sake of brevity this proceeding will be called an APPEAL IN ERROR, the name by which it is usually designated in the books It must be granted, on the application of the party aggrieved, during the term of the court at which the judgment complained of is rendered It takes to the Supreme Court a copy of the record in the cause, and that court hears the case for the correction of alleged *errors of law,* appearing on the face of the record.

A great many errors may be committed that do not appear in what has been designated the technical record, and, as before stated, a bill of exceptions is necessary to insert them in the record Thus, the jury may have been guilty of misconduct — their verdict may have been inconsistent with the evidence or with the law as stated by the court; the court may have committed an error in the charge, or in ruling upon the evidence; the party may have been surprised, or he may have discovered new evidence. None of these things appear on the record, and when such is the case, the course to pursue is for the party to enter a motion for a new trial, and, if that is refused, then prepare and tender his bill of exceptions It is the object of the bill of exceptions to put all these matters

73 Wells *v* Mosely, 4 Coldw. 405, 2 Lea, 397, Allen *v* State, Mart & Y. 295.

complained of on the record, so that the Supreme Court can see that the Circuit Court committed an *error of law* in not granting a new trial. Neither the notes, depositions, or other writings given in evidence, or testimony of witnesses taken *viva voce,* the charge of the court, or the affidavits in support of the motion for a new trial, constitute parts of the record to be noticed by the Supreme Court, unless they are made so by the bill of exceptions.[74]

BILL OF EXCEPTIONS.

§ 26. This is designed to give, as nearly as practicable, an exact history of the case, in conducting it through the Circuit Court It should include *all the evidence.* It should show what evidence was objected to and excluded on the trial, as well as what was objected to and admitted. It should include the charge of the court, the affidavits read in support of the motion for a new trial, and which may contain the evidence of the misconduct of the jury, surprise, newly-discovered evidence, or other fact upon which the party could rely as a ground for a new trial; and finally it may contain what the circuit judge said in overruling the motion for a new trial. The common language of the decisions is that the *whole* case must appear to enable the appellate court to see whether any particular thing that was done might have been injurious to the party.

It is the business of the party who wants a new trial to write out the bill of exceptions, for he it is who excepts to the decision of the court overruling his motion. It is then to be examined by the judge, and if he finds it correct he signs and seals it, and files it with the clerk Usually, however, the counsel on both sides have examined it before

74. Spurlock *v* Fulks 1 Swan, 289; Williams *v.* Hubbard, 7 Humphr 255 418; McGee *v* Grady, 12 Lea, 96; Hardwick *v.* State, 6 Lea, 229.

it is submitted to the judge, and upon their agreement to its correctness he signs it without further examination. If they disagree about it, he settles the dispute

The following form of a bill of exceptions, which, of course, must be changed to suit the facts of the particular case, will perhaps give the student a more definite idea of what it should contain. Of course it contains only such matter as would not be parts of the record without it:

Bill of Exceptions.

A B
v.
C. D

On the trial of this case the following evidence was submitted to the jury (or, to the court if no jury)

Witnesses for the Plaintiff

1 E F deposed as follows

(Here proceed with the testimony of the witness, both on his original and cross examination. And when through with the first witness take the second, and so on to the end If during the examination of a witness some particular question is objected to, and the objection is sustained or overruled, the ruling of the court would be made to appear by setting out at that point in the testimony the facts as they occurred, thus "The plaintiff (or, defendant) asked the witness the following question (Here state the question) The question was objected to by the defendant (or, plaintiff), and the objection was sustained (or, overruled) by the court, to which ruling of the court the plaintiff (or, defendant) excepted" The objection may be to the answer of the witness, and not to the question The facts would be made to appear in the same way. The objection may be to the witness, on the ground that he is incompetent to testify at all, or in the particular case, or as to the particular fact The first would arise where the witness has been convicted of an infamous crime, and judgment of infamy pronounced against him In this case, if the witness is excluded it is not necessary that the record should show what he would have proved, nor what was proposed to be proved by him The objection is not to what he may say, but to his right to say anything But whether the witness is excluded or admitted in any case, the record should show the facts on which the objection to his competency was grounded. Where the witness is incompetent in a qualified sense, as that she is the wife of the party, then not only the fact of the relation, but what is proposed to be proved by her should appear for, as she is a competent witness for or against her husband, as to

some things, the court, without a statement of her evidence, could not intelligently determine the soundness or unsoundness of the objection)

The plaintiff introduced in evidence the following writing

1. A grant from the State of Tennessee to I B. (Here insert it)

(It is not necessary in making out a bill of exceptions to actually *copy* therein the writings, whether deeds, receipts, notes, depositions, etc , but they must be designated by a sufficient description, and then show a purpose to make them parts of the record by the use of the words, *here insert*. This is a direction to the clerk to put the paper described into the record when he comes to make out the transcript Of course, if there was an objection made at the time of the reading of any paper or deposition, the objection should appear in the bill of exceptions in connection with the facts and the ruling of the court, as in other cases)

The following depositions were read by the plaintiff

1. The deposition of G. (Here insert it)

(All exceptions to depositions, just as in the case of exceptions to testimony taken *viva voce*, and the ruling of the court thereon, must appear in the bill of exceptions and in connection with the depositions Sometimes the exceptions and rulings of the court are written on the deposition In such case the order to insert the deposition would include the exceptions also, and it would not be necessary to repeat them, as the clerk in copying the deposition should copy everything on it)

The plaintiff here closed his proof, and the defendant introduced the following evidence

(Here proceed in all respects the same as directed for the plaintiff)

When the defendant has concluded, the plaintiff may wish to introduce rebutting evidence If so, say)

The plaintiff then introduced the following rebutting evidence

(Here setting it out, or directing it to be inserted as above explained.)

(Here conclude this part of the bill with this statement)

This was all the evidence.[75]

(Then proceed as follows)

The court charged the jury as follows: (Here insert)

The plaintiff introduced the following affidavits in support of his motion for a new trial

1 The affidavit of H (Here insert it)

The court in overruling the motion for a new trial said: (Here insert)

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75 If the bill of exceptions fails to show that it contains all the evidence, the court will presume there was enough to sustain the ruling of the circuit judge. Matthews *v* Weeden, 4 Yerg 166, Melton *v* State, 3 Humphr 390, Sibil *v* State, 3 Heisk 140, Harris *v* State, 3 Heisk 140, Trott *v* West, 10 Yerg 500, Nolen *v* Wilson, 5 Sneed, 333; Sweet *v.* Rogers, 6 Heisk. 119; Holbert *v* Seawright, 3 Baxt. 170.

The plaintiff tenders this, his bill of exceptions, to the judgment of the court overruling his motion for a new trial, which is signed and sealed and ordered to be made a part of the record

W. H WILLIAMSON,
Judge.

§ 27. If the judge refuses to sign the bill of exceptions, the remedy of the party is to apply to the Supreme Court for a mandamus. So, if he refuses to insert in it what the party contends was really the fact, his only remedy is a mandamus to compel him to do it.[76] The minutes of the court need not show the fact that the bill of exceptions has been signed by the judge,[77] but it is usual to put on the minutes the following:

Entry of the Bill of Exceptions.

A B
v.
C D

The plaintiff tendered his bill of exceptions to the judgment of the court overruling his motion for a new trial, which being signed and sealed by the court, is ordered to be made a part of the record

But this entry does not make the bill of exceptions a part of the record. It must be signed by the judge, and it is that act which makes it a part of the record,[78] and if not so signed it is a nullity, though the record state that it was signed, sealed, etc.[79] It must be signed at the term during which the trial of the cause was had. It cannot be amended or signed at any subsequent term. And this is so, though the argument of the motion for a new trial be continued to a subsequent term.[80]

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76 Miller *v.* Koger, 9 Humphr. 236; State *ex rel v.* Hale, 3 Coldw 263

77. Grubbs *v.* Greer, 5 Coldw. 160.

78. Grubbs *v.* Greer, 5 Coldw. 160, § 3682, M. & V

79 Garrett *v.* Rogers, 1 Heisk 321

80 Steele *v.* Davis, 5 Heisk 76, McGavoch *v.* Puryear, 6 Coldw. 34, Girdner *v.* Stephens, 1 Heisk 280, 321; Hill *v.* Bowers, 4 Heisk. 272.

§ 28. Before the appeal in error is granted the appealing party is required to give bond with good security for the due prosecution of the appeal. This is the only condition he has to comply with; he is not bound to assign any reasons for the appeal.[81] The sureties on the bond shall be bound for the whole judgment, including damages and costs appealed from, and bound for the satisfaction of the judgment of the Superior Court, where the cause may be finally tried and determined in all cases where the action is founded on: 1 Bonds for the payment of money. 2. Bills single. 3. Bills of exchange. 4. Promissory notes. 5. Liquidated accounts signed by the party to be charged therewith. 6. Written obligations for the payment of bank notes. 7 Notes or written obligations for the delivery of specific articles; and 8. Indorsement of negotiable paper In all other cases at law the bond shall be for damages and costs only.[82]

The form of the bond may be as follows:

We, A B and C., acknowledge ourselves indebted to D E in the sum of two thousand dollars, to be void, if the said A B shall prosecute with effect an appeal in the nature of a writ of error to the next term of the Supreme Court of Tennessee, at Nashville, by him prayed from a judgment rendered against him in favor of the said D E in the Circuit Court of Wilson county, on the 20th day of May, 1887, for the sum of one thousand dollars debt and damages, and also the costs of suit, or if he fail to do so, shall pay and satisfy said debt, and damages and costs, and shall also satisfy the judgment of the Supreme Court in the premises.

If the bond is only for damages and costs, after words "if he fail to do so," say:

Shall pay all such damages and costs as may be awarded against him by the Supreme Court in the premises

81 §§ 3877, 3894, M. & V

82. §§ 3879, 3880, M & V The courts in construing the statutes of Tennessee hold that poor persons may prosecute appeals, appeals in error, writs of error, and *certiorari* on taking the pauper's oath, and excepting a *certiorari* in the action of forcible entry and detainer, without restriction as to the *character* of the action. Heatherly *v* Bridges, 1 Heisk. 220; Herd *v.* Dew, 9 Humphr. 365

By damages is here meant 6 per cent. interest on the judgment from the time of the appeal until judgment is affirmed in the Supreme Court.

The minutes of the court should show the granting of the appeal. The entry is as follows:

Entry of the Appeal.

D E
t
A. B

The defendant prays an appeal in the nature of a writ of error to the next term of the Supreme Court at Nashville, and having given bond with C, his security, the same is granted

The attorney of the appellant should see that this entry, as well as all others, is made.

TRANSCRIPT OF RECORD.

§ 29. The clerk is to make out and transmit to the clerk of the Supreme Court a transcript of the record in forty days after the entry of the appeal. If the entry is made within forty days of the next regular term of the Supreme Court, or during such term, he must make out and transmit the transcript immediately. He may send it either by mail or any safe private conveyance[83] The record is to be accompanied with a complete bill of the costs of the Circuit Court, so that if the judgment should be affirmed, the costs may be collected by one execution issued from the Supreme Court[84]

The following order should be pursued in making out the transcript:

1. The Caption of the record of the term at which the final judgment is rendered, which has been heretofore given.

2 The Prosecution Bond, or Pauper Oath

3. The Summons—The Indorsements on it All

83. § 4819, M & V. 84 § 3941, M. & V.

alias writs, counterparts, and judicial and ancillary attachments, if any, with the indorsements on them, showing when issued, and the sheriff's returns. If the suit was commenced by original attachment, the affidavit, bond, writ, returns, replevy bonds, and all the papers in regard to it.

4. THE PLEADINGS, including the declaration, pleas in abatement and in bar, demurrers, replications, etc.

5. ENTRIES ON THE MINUTES, from first to last, stating the date of them. The last entries will be the verdict and judgment, the motion for a new trial overruled, the filing of the bill of exceptions, giving bond, and the appeal.

6 THE BILL OF EXCEPTIONS. Into this copy the depositions and all instruments of writing, and the charge of the court, at the places directed by the words in brackets (here insert it), leaving out those words.

7. THE APPEAL BOND.

8. THE BILL OF COSTS.

Put over each of these eight items, in a line to itself, the heads above given in capitals, and head off the bill of exceptions in the same way with the titles, witnesses, depositions, writings, charge. This facilitates reference to the record For the same purpose, page it.

The whole is closed by the clerk's certificate, which may be thus:

I, S G. Stratton, clerk of the Circuit Court of Wilson county, do certify that the foregoing is a true and perfect transcript of the record and bill of costs, remaining in my office, in the case of A B against C D

Given under my hand and seal of office, this day of , 1887

[SEAL.] S. G STRATTON,
Clerk

Subpœnas for witnesses, affidavits for continuances, and other interlocutory orders and writings, not made part of the record by bill of exceptions, or by the pleadings, need not be copied. Some entries might be omitted. But the

only safe course for the clerk is to copy everything that is not certainly unnecessary. It is better to have too much than too little.

§ 30. The effect of the appeal in error is to *suspend,* not to abrogate, the judgment of the inferior court. It also suspends the jurisdiction of that court, so that it can take no action in the case until it is disposed of in the appellate court. The case is immediately transferred to the appellate court, and all steps taken in it afterward in the lower court are void.[85] This suspension of the judgment and jurisdiction of the inferior court continues until the appellate court terminates it by some action disposing of the appeal in error. The mere neglect of the appellant to prosecute it, no matter for how long a time, does not revive the suspended jurisdiction. But an abatement or dismissal of it does revive the judgment, and the inferior court may proceed to carry it into execution.[86]

Although the appeal in error transfers the case at once to the appellate court, as the simple appeal does, yet it is for a different purpose. It is not for the trial of the case anew, but to try whether the inferior court committed errors in the trial or disposition of it. No new evidence is introduced, no re-examination of the merits of the case is had, but the record brings up the case as it was presented to the court below, and as that court decided upon it finally; and it raises the question, Was there any error in its decisions that may have been injurious to the appellant? If no error is found, the judgment below is affirmed. If error is found, the judgment is reversed, and the appellate court gives such judgment as the court below ought to have given. Hence the appeal in error is a mere suspension of the judgment and jurisdiction below upon an

85. Staggs *v.* State, 3 Humphr. 375, Davis *v.* Jones, 3 Head, 603; Hill *v* Bowers, 4 Heisk 273

86. Furber *v* Carter, 2 Sneed, 1, Kimbrough *v.* Mitchell, 1 Head, 541; Thomasson *v* Kercheval, 10 Humphr 321.

impeachment of errors, and it must be revived if the impeachment is dismissed.

WRIT OF ERROR.

§ 31. If the party fails to take an appeal in error, he has still another chance. The law is munificent in its remedies, not willing that any should suffer injustice. It affords ample and varied means of redress to all who will seek it with reasonable diligence. It may not be in the power of the aggrieved party to give the necessary security for an appeal until the court adjourns. He may not be sufficiently satisfied that error has been committed; he may not discover the error in time for an appeal. He is therefore allowed a WRIT OF ERROR, after the adjournment of the court, in every case in which he could have had an appeal in the nature of a writ of error before the adjournment.[87]

If a new trial is what he wants, and he is not prepared at the trial term to appeal, he must then file his bill of exceptions and let it remain until he may choose to apply for a writ of error

§ 32. The party wishing to obtain a writ of error gets a transcript of the record from the clerk, and upon filing it with the clerk of the Supreme Court, and giving the same bond that is required upon an appeal in error, the clerk of the Supreme Court is bound to issue the writ of error.[88] The applicant must first, however, give to his antagonist five days' written notice of his intention to apply for the writ.[89] He must make this application to the clerk within one year after the judgment.[90] He may, in like manner, file his transcript and obtain the writ of error from the Supreme Court or from any judge of that

87. § 3895, M. & V.
88. § 3896, M & V
89. § 3903, M. & V.
90 § 3900, M. & V.

court.[91] He is allowed two years from the date of the judgment to obtain it from the court or a judge thereof.[92] Infants, married women, persons imprisoned, insane, or out of the United States are allowed the same times after their disabilities are removed to obtain the writ.[93]

If the party has actually taken an appeal in the nature of a writ of error, and it has been dismissed because the record was not filed in time, he may in the same way and time obtain a writ of error.[94] The writ of error in these cases is mere matter of form. No writ actually issues The only object of a writ would be to bring up a copy of the record That is already filed, all that the writ could accomplish is done.[95] The *procedure* is called a writ of error because it effects the same object that the writ effected when one did actually issue.

§ 33. The writ of error alone is not quite as potent a remedy as the appeal in error. The latter suspends the judgment of the Circuit Court, so that no execution can issue on it. But the writ of error does not; the execution runs on, and satisfaction may be obtained while the party is prosecuting his writ in the Supreme Court. The granting of the writ of error is a matter of course; the applicant has a right to it, whether there is really any error or not. If, however, he thinks there is error, and wants to stop the execution on account of it, he applies to one of the judges of the Supreme Court for a *supersedeas,* laying before him a copy of the record; and if he considers there is error in it, he orders the clerk of that court to issue a *supersedeas.*[96] If any property has in the meantime been sold under the execution, the purchaser acquires a good title.[97] But if the Supreme Court reverses the judgment below, the appellant is entitled to

91 §§ 3896, 3901, M. & V.
92. § 3901, M & V.
93 § 3902, M. & V
94. § 3905, M & V
95. Cain *v* Cocke, 1 Lea, 289.
96. § 3897, M. & V.
97. § 3906, M. & V.

indemnity by restitution of the property if not sold, or by payment of the proceeds, if sold.

CERTIORARI.

§ 34. It remains to notice under this head the writ *certiorari*. The word *certiorari* means "to be certified of," or, "to be informed of" It is the name of a writ issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify to the former the record in the particular case.[98]

This writ was only used in the English common law in criminal cases, to remove indictments or other criminal proceedings, from inferior tribunals into the Court of King's Bench, to be there tried, quashed, or confirmed.[99] And in our law it may be used in criminal cases likewise "where inferior or special tribunals inflict penalties or forfeitures, or otherwise act by conviction or by way of punishment of the citizen, pursuant to statutory regulations, in cases where a writ of error will not lie, as it will not where those exercising the cognizance in question are not constituted courts of record, or being such, do not follow the common-law forms of procedure.[1]

Without the aid of any statute, the practice obtained in North Carolina at an early day, and while Tennessee was a part of that State, of applying the writ to civil as well as criminal cases. This extended application of it encountered strong opposition, but it was considered so important to the ends of justice that it was secured to the citizen by the Constitution. It is therefore a common-law remedy in Tennessee, both in criminal and civil cases, enjoying in civil cases the protection of the fundamental law.[2]

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98. See Bouv Law Dict. 99. 4 Bl Comm. 272, 320
1. Durham *v.* United States, 4 Hayw (Tenn) 69.
2. Duggan *v.* McKinney, 7 Yerg. 21; Const. Tenn., art. 6, § 10.

The Code of Tennessee provides in general terms that the writ may be granted *whenever authorized by law.* By judicial construction, however, this does not seem to make it a matter of right in any case, but its issuance is subject to the sound discretion of the court or judge to whom the application is made.[3] A further provision of the same section of the Code authorizes the granting of the writ in *all cases* where an inferior tribunal, board, or officer exercising judicial functions *has exceeded the jurisdiction conferred* or *is acting illegally,* and there *is no other plain, speedy, and adequate remedy.*[4]

The concluding restriction placed on this provision of the law confines the use of the writ to cases of unusual occurrence If the proceedings have been according to the course of the common law, and the party may avail himself of the usual remedies by appeal or writ of error, the *certiorari* will not be granted.[5] Applications to the Supreme Court for this writ are exceedingly rare, for the reason that the extraordinary circumstances do not often arise to justify its issuance. The Circuit Court is a court of general jurisdiction, and if irregularities justifying the issuance of the writ should occur in boards or tribunals subordinate to that, the writ would be returnable to that court, and the cause would thence proceed in the usual course by appeal or writ of error to the Supreme Court If, however, the original wrong complained of occurred in the Circuit Court or Chancery Court, and the law has failed to provide a remedy by appeal or writ of error, this would present a proper case for an application to the Supreme Court for the *certiorari.*

Another instance of the use of this writ in the Supreme Court, is when an appeal or writ of error has been prose-

3. State *v* Taxing Dist Memphis, 16 Lea, 246
4. § 3838, M & V
5. Cooper *v* Summers, 1 Sneed, 455; State *v.* Taxing Dist., 16 Lea, 246, § 3839, M & V.

cuted from the judgment of an inferior tribunal and a complete copy of the record has not been sent up to the appellate court. The application is without special form. The attorney interested in the matter by any means that may be satisfactory to the court makes the fact appear that the transcript does not contain a full record of the cause, which proceeding is styled "a suggestion of diminution," and thereupon asks the issuance of *certiorari*. The writ is issued from the office of the clerk of the Supreme Court, directed to the keeper of the record or proceeding below, commanding him to *certify* and send up a complete record or transcript.[6]

Remarks upon the *certiorari* need not be further extended in this connection. The student has seen that it is not of general utility as a remedy for the correction of errors in the Supreme Court. In a subsequent chapter it will be more fully considered in connection with the appellate jurisdiction of the Circuit Court.

§ 35. When a cause has reached the Supreme Court by any one of the modes before pointed out, it stands for trial at the first term, without any notice to the opposite party, if the appeal was taken before the commencement of the term If the appeal or writ of error is taken during the term, the record must be filed, and the opposite party notified five days before the hearing.[7]

The court sets the causes from the different circuits for trial upon different weeks, giving three months' notice thereof by publication.[8] This saves the lawyers from the necessity of attending the court during the whole term, to be ready for their cases as they might come up for trial The court prescribes whatever rules of practice (not inconsistent with the statutes) it may deem necessary for

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6 Hamilton *v* Hodgkiss, 1 Tenn 109, Durham *v* United States, 4 Hayw (Tenn) 69, Barnes *v* State, 5 Yerg 182

7. §§ 5266, 5267, M & V.

8 § 5254, M & V

the better disposal of its business.[9] The same power belongs to the Circuit Court Indeed, it is a power that belongs to all courts, without any express statutory authority. Every being that acts must have or should have rules of action, and if they are not prescribed by a superior power, the actor must prescribe them for himself.

§ 36. An appeal may be dismissed because the transcript is not filed within the time prescribed by the rules of the court.[10] The cases are very few in which a dismissal can occur. For there is to be no dismissal for matters of form, or for want of jurisdiction in the court in which the action was instituted, unless there was a demurrer on that account.[11] And "no writ of error or other proceeding in civil actions in the Supreme Court shall be quashed or dismissed for any defect, omission, or imperfection"[12] If it is dismissed because there has been no appeal, or an appeal from an interlocutory judgment, or no regular transfer of the case from the inferior court, so that the court cannot entertain jurisdiction, it would seem that no judgment at all could be given, but the case simply stricken from the docket, but it is provided in such case that the court may render judgment for costs against the party attempting to bring up the case[13]

§ 37. No assignment of errors is necessary[14] This will devolve upon the court the necessity of looking into the record and giving judgment upon any error that may be referred to in the argument, or otherwise ascertained by the court. The case stands for trial or argument without anything more than the record itself presents. By the common law the appellant had to file an assignment of the errors on which he relied, somewhat like a declaration,

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9 § 5255, M & V
10 § 3905, M & V
11. § 3585, M & V
12 § 3575, M & V
13. § 3940, M & V, Cartmell *v* McClarin, 12 Heisk 44, Jackson *v.* Baxter, 5 Lea 345
14. § 3877, M & V.

on which the appellee joined issue, and the only question for the court was, whether any of the errors thus specified were to be found in the record. But the question with our court is, Are there *any* errors in the record?(*a*)

The case may by consent or for any sufficient reason be continued to a future day or a future term.

When the case is called on the docket, each party presents to the court a *brief*, in which the facts, the points of law relied on, and his argument, are briefly stated.

Should any further argument than is contained in his brief be deemed necessary, he may under the rules of the court proceed with oral argument. He is answered by his adversary, to whom he replies, and that finishes the argument. The record is then handed to the court to take to their consultation chamber.

The judges are to give written opinions, stating the points of law on which their opinions are based, in all cases, except those in which there is no defense.[15] These opinions are to be filed with the clerk, and every one of them reported by the Attorney-General which decides any point not settled in some previous reported decision.[16] The court take their own time to form and pronounce an opinion, and if they cannot come to a satisfactory conclusion during the term, they may hold it under advisement until the next term.

If they conclude there is no material error in the proceedings of the Circuit Court, they affirm the judgment, and render judgment against the appellant and his sureties in the appeal bond, according to the condition of the bond.

The court is not to reverse except for errors affecting the merits of the case[17] It is to render such judgment as the court below should have rendered, and issue execu-

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(*a*) Recent rules of Supreme Court of Tennessee require the assignment of errors

15. § 4699, M. & V.

16. § 4725, M. & V.

17. § 5268, M. & V

tion, except where it may be necessary to ascertain damages, and then the case is remanded to the Circuit Court for that purpose.[18] When the appeal is for arresting or not arresting judgment, and the Supreme Court reverses the decision below, it can usually render a final judgment without sending the cause back. But where the error complained of is a refusal to grant a new trial, a reversal grants another trial, and the cause is remanded for that purpose.

Formerly the rule in the Supreme Court of Tennessee seemed to be in civil cases not to reverse on the facts if there was any evidence to sustain the verdict.[19] The rule now seems to be not to reverse unless the evidence greatly preponderates against the verdict.[20]

§ 38. Sending the cause back to the Circuit Court for a new trial, or for any other purpose, is called *remanding* it. No writ of *procedendo* issues, commanding the inferior court to proceed; but the clerk of the Supreme Court issues to the Circuit Court a certified copy of the judgment of reversal, and of the opinion of the court, containing the reasons of the reversal. This he must do within sixty days after the adjournment of the Supreme Court, and before the next succeeding term of the Circuit Court.[21] The transcript is retained, so that if the case should again come back, there will be no use for any further copy of the Circuit Court record, except from the time of the remanding.

The law of Tennessee requires that the Supreme Court shall, in all cases where, in its opinion, complete justice cannot be had, by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceed-

18. § 3886, M & V
19. Walker *v* Galbreath, 3 Head 315, Tate *v* Gray, 4 Sneed, 594.
20. Nance *v* Hainy, 1 Heisk 181
21. § 4864, subsec 2, M. & V.

ings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.[22]

When the cause is remanded, the jurisdiction of the Circuit Court, which was suspended, now revives, the cause is replaced on the docket, and stands for trial as soon as the parties can resummon their witnesses; for their testimony, as contained in the bill of exceptions, cannot be read. It is said the bill cannot even be read to illustrate the opinion of the Supreme Court.[23] The cause takes its wonted course to final judgment, when another appeal may be taken; and thus there is no end to the controversy, until one or the other abandons it, or the Supreme Court terminates it by a final judgment. And even then, there are a few cases in which the losing party, claiming his rights under the authority of the Federal government, may appeal to the Supreme Court of the Union.

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22. § 3889, subsec 2, M. & V.
23. Massengill *v.* Boyles 11 Humphr. 112

CHAPTER XI.

JUDGMENT AND EXECUTION.

§ 1. Having pursued the history of a lawsuit to the final judgment, it is now proper to consider briefly the judgment itself, and some of the principles of law relating to it, and then the execution which the judgment awards. And first, it may be stated that a judgment on the merits of the case is conclusive upon the parties to it, and those claiming under them, called *privies,* as to every matter involved in the suit.[1] But if the court rendering the judgment has not jurisdiction of the subject, it is void. So if the defendant had no notice where the law requires he should have it, then the court has no jurisdiction of the person, and the judgment is void on that account.[2] If the judgment is void upon its face, it may be treated as a nullity whenever it is offered in evidence. But if its invalidity depends upon a matter of fact not appearing on its face, such as the death of the defendant at the time it was rendered, it cannot be attacked collaterally, that is, when it is offered in evidence in another suit, but it must be directly attacked by the party interested in annulling it, by some regular proceeding for that purpose. The writ of error *coram nobis* is the regular legal remedy.[3]

§ 2. A judgment is a lien on the defendant's land; that is, it is a charge fixed on the land so that it follows it, no matter to whom it may be conveyed. Before judgment any one may safely purchase it, if he does it hon-

1 1 Greenl Ev, §§ 522, 523, 524, Hunt *v* Hale, 8 Yerg. 142, Hodges *v* Buchanan, 8 Yerg 186

2 Hughes *v* Bryan, 6 Yerg 471

3. Hall *v* Heffy, 6 Humphr. 444; Thacker *v.* Chambers, 5 Humphr 313; 5 Humphr 318, § 3829, M & V

estly, and not with intent to defraud the plaintiff or any other creditor. But after judgment, if he buys it, no matter how honestly, he takes it subject to the judgment. The lien extends to all the defendant's lands in the county where the judgment was rendered, but, in the absence of actual notice, it does not attach to lands in other counties until registration of the judgment in those counties As to lands in the county of the judgment, the lien commences from the date of the judgment, but as to lands in other counties, it commences from the date of registration Those who desire to buy land, naturally look to the records of the county of the seller's residence, or of that in which the land lies, to see whether his title is incumbered. The plaintiff, however, will lose his lien if he delays beyond a year to have the land levied on and sold, unless he is prevented by injunction, writ of error, appeal, or some adverse proceeding which compels him to wait, and then it is continued a year after the removal of the obstacle.[4]

A judgment is not a lien on personal property [5]

§ 3. At the common law the plaintiff is required to issue his execution within a year and a day after the rendition of the judgment, otherwise the court presumes the judgment satisfied He might, however, obtain an execution by bringing the defendant into court by a *scire facias* to show cause why the judgment should not be revived and execution issue [6] This is unnecessary with us. Judgments are not presumed satisfied, so as to prevent the running of an execution on them. But in Tennessee they are subject to the statute of limitation of ten years; that is, after that period they are barred so that the plaintiff cannot have his execution. The bar of the statute may be prevented in either of two ways: First, the judgment mav

4. On the subject, generally, see the following §§ 3694–3700, M & V; Porter *v* Earthman, 4 Yerg 359, 4 Yerg 270; 4 Humphr 296; 9 Humphr 325; 2 Sneed, 665, 12 Heisk 450.

5. McNairy *v.* Eastland, 10 Yerg 318

6. 3 Bl Comm. 421; Hess *v.* Sims, 1 Yerg 143

be revived by *scire facias* before the statute has run its course, or, second, it may be sued upon as the foundation of a new action And so if the period of the statute has elapsed, the plaintiff may have his *scire facias* or new action, and to the defendant's plea of the statute may reply any new fact in avoidance of it. The issuance of an execution is not an action to revive a judgment, and on a motion to quash it because issued on a judgment more than ten years old, the plaintiff will not be permitted to present an issue for the purpose of showing the case taken out of the statute. Such an issue can only be raised by *scire facias* to revive, or upon a new action brought [7]

§ 4. If there be but one plaintiff or defendant, and he dies after judgment and before execution, the judgment must be revived by *scire facias* for or against his administrator or executor, before an execution can issue But if the execution has been issued before his death, it may be levied, and the property sold, as if the death had not occurred [8] And if it be tested before his death, though issued after, it has the same effect. The execution is always tested the first day of the preceding term, and has full force and effect from that time in virtue of the legal fiction of relation.[9]

If there were two or more plaintiffs or defendants, and one died at common law, the execution issued in their joint names as if the death had not occurred; but the death should be suggested.[10] The Code of Tennessee so far changes the common law as to give the plaintiff his election to issue his execution against the surviving defendant, or revive the judgment against the representative of the deceased by *scire facias*.[11]

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7. Cannon *v.* Lamar, 7 Lea, 513; McGrew *v* Reasons, 3 Lea, 486
8. Tidd Pr 1118
9. Johnson *v* Ball, 1 Yerg 292, Battle *v.* Bering, 7 Yerg 528, Neil *v.* Gaut, 1 Coldw 395
10. Tidd Pr 1120, Cabiness *v.* Garrett, 1 Yerg. 491
11. § 3702, M & V

§ 5. The successful party recovers of his adversary full costs, with some exceptions.[12] The witnesses are bound to attend, and the officers are bound to perform the services required of them, for the compensation allowed by law, without payment in advance. It has been decided that a witness may recover his fees by suit of the party who summoned him at the end of the term, whether the suit is ended or not.[13] It has not been decided that the officers may recover theirs before the suit is ended. The understanding is that they must wait the event of the suit. If then the unsuccessful party is not able to pay them, they may *sue* the successful party for all fees due for services rendered at his instance, or, at their election, proceed against him by *motion*.[14]

A large part of the costs may have been disposed of before the suit is ended, so that the losing party may not then have much to pay. On continuances, amendments, demurrers, pleas in abatement overruled, new trials, and other interlocutory orders, judgments are given for costs, and that is a final disposition of them; they are not taxed to the losing party upon the final judgment.[15]

In cases of nonsuit, dismission, abatement by death of plaintiff, or discontinuance, the defendant is successful.[16] If a defendant's appeal from a justice is dismissed, the plaintiff below is successful.[17] In a plea of set-off, where both parties sustain their claims, they are both successful, and each recovers of the other the costs accruing in the establishment of his claim.[18] Where judgment is arrested, each pays his own costs, and judgment is given against

12. § 3921, M & V
13. Wetherspoon *v* Killough, Mart. & Y. 39; Caren *v.* Breed, 2 Coldw. 467.
14. § 3928, M. & V.
15. Ross *v.* McCarty, 3 Humphr. 169.
16. § 3925, M. & V.
17. § 3926, M. & V
18. Maupin *v.* Whitson, 2 Heisk. 2 But if the set-off exceeds the plaintiff's demand the defendant recovers all costs § 3632, M. & V.

them accordingly.[19] Where the plaintiff succeeds against one defendant and fails as to another, he recovers the costs accrued as to one, and the successful defendant recovers of the plaintiff the costs accrued as to him.[20] Where a plaintiff includes in his declaration two causes of action, and one is found in his favor and the other against him, the defendant recovers the costs arising in relation to the latter, for he is successful on that.[21]

It is provided in Tennessee that the plaintiff shall recover no more costs than damages in actions for assault and battery, malicious prosecution, and false imprisonment, unless the damages recovered exceed five dollars, and the same rule applies in actions for slanderous words, unless the damages recovered amount to as much as five dollars.[22]

The taxation of costs is left to the clerk under the direction of the judgment. The file of papers and the minutes and witness docket will indicate usually what fees are to be taxed. But in some things the clerk will need the direction of the court. Only two of his opponent's witnesses to the same fact are to be taxed to the losing party, except witnesses to character, and three of them. He must move the court at the trial term to direct the clerk what two or three he is to tax; this cannot be done afterward without showing good cause, and then he may not succeed, for the facts are likely to have faded from the memory of the court.[23] So witnesses who proved nothing material, or were not examined, or did not attend the trial, though they might have attended before, are not ordinarily to be taxed; and the clerk may need directions on the subject, for he is not authorized to decide upon the materiality of a witness' testimony, or because not

19 Caldwell *v* State, 2 Sneed, 490
20. Sloan *v* Parks, 2 Swan, 62
21. Allison *v* Thompson, 2 Swan, 203
22. Bates *v.* Sullivan, 3 Head, 633, §§ 3922, 4138, M. & V.
23. §§ 3938, 3939, M. & V.

examined, that they are not to be taxed; for it is said if they are attending to rebut some adverse evidence which there is reasonable ground to anticipate, they may be taxed.[24] If in these and other cases the party thinks they are wrongfully taxed, he may at a subsequent term move to correct the taxation of costs, giving his opponent five days' notice of the motion. So costs omitted may be inserted on such motion.[25] The clerk makes out the bill of costs after the court adjourns, and puts it on the execution docket, and copies it from thence on the execution when issued. Each item is to be stated in words unabbreviated, except the amount, which may be in figures Any item not so stated is to be disregarded, and may be struck out of the bill of costs.

EXECUTION.

§ 6. Passing from the judgment, it now remains for this chapter to consider the execution, which is final process. By it the lawsuit is put to an end, and the successful party enabled to get the fruits of the litigation. It must therefore be adapted to the end for which it is designed.

Some judgments, we have seen, are for the recovery of specific property, and others for money. The former are of two kinds. In the action of ejectment land is recovered, and as that is not movable, it is certain that the sheriff can find it and deliver it to the plaintiff; therefore the value of it is not recovered in the event of the defendant's failure to deliver it. But in detinue and replevin personal property is recovered, it may be run off or perish, and the plaintiff in detinue or the defendant in replevin may thus never get it. The value therefore is assessed by the jury at the highest price, in order to

24 Knox *v* Thomas, 5 Humphr. 572

25 §§ 3936 3937, M & V As to costs of witnesses not summoned, see 2 Coldw 310, 3 Lea, 655, 8 Humphr. 288, 2 Yerg 232.

enforce the delivery; and the judgment is that he recover this assessed value, if he does not get the property. The main object of the suit in both cases, whether it is for land or personalty, is the same — the regaining of the specific thing sued for. And therefore the main object of the execution ought to be the same. But as in regard to personalty the main object may be defeated, the execution should follow the judgment in affording to the party the alternative remedy — the value in money.[26]

The law provides that when specific property, real or personal, is recovered, the court may carry the same into effect by writ of possession, or other process sufficient for that purpose.[27]

The writ of possession was the ordinary common-law execution where land was recovered. It commands the sheriff to deliver the land to the plaintiff. If the defendant does not voluntarily deliver it, the sheriff forcibly turns him out of possession, and puts the plaintiff in.

The same writ may now issue where personal property is recovered, either by the plaintiff in detinue or the defendant in replevin. "A writ of possession" can only mean a writ commanding the sheriff to deliver the possession to the party to whom it is adjudged.

But the court is not confined to the writ of possession. It may carry the judgment into effect by "other process sufficient for the purpose." The writ of possession is made the ordinary process; if that is not sufficient other processes may be resorted to. In detinue the first process at common law was the writ of *distringas*, commanding the sheriff to distrain — take and keep — the defendant's property, in order to compel him to deliver to the plaintiff the property recovered. If that did not distress him into a return of it, an execution issued to collect the value.[28]

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26. Waite *v* Dolby, 8 Humphr 410.
27. § 3713, M. & V
28 3 Bl Comm. 413, 8 Humphr. 409.

In replevin, on the contrary, the writ *de retorno habendo* was first issued in behalf of the defendant; it was in effect a writ of possession. If the property was not found, a *capias in withernam* issued, which was the same in replevin that the *distringas* was in detinue, commanding the sheriff to distrain or take in pledge the plaintiff's goods, to compel him to return the defendant's.[29] The *distringas* might be important to a party recovering highly esteemed personal property. Whatever process known to the courts may seem best calculated to effectuate the primary objects of the judgment, may be directed by the court. Among others, when an execution according to the principles of the common law cannot be made to apply to the purpose of carrying into effect any judgment, the court may enforce it by attachment for contempt in the nature of an execution.[30]

When the judgment is for money, the *fieri facias* is the only execution known to our law; it is familiarly called *fi. fa.* It is a common-law writ; but it only authorized the sheriff to levy on personal property Land was not subject to execution. The writ of *levari facias* was an execution which might be levied on personal property and the profits of the land. The writ of *elegit* was given by statute, whereby half the land might be taken and delivered to the plaintiff till out of the profits his judgment was satisfied. The *extent* or *extendi facias* was given on recognizances, that is, acknowledgments of debts on the records of the court; and by this all the defendant's lands might be taken and put into the plaintiff's possession until the profits satisfied his debt. To all these was added the *capias ad satisfaciendum,* commonly called *ca. sa.,* by which the body of the defendant might be taken and imprisoned till he paid the judgment.[31] The *ca sa.*

29 3 Bl Comm 413 30. § 3817, M & V.
31. 3 Bl. Comm 417–421.

was partially abolished in civil cases in Tennessee in 1831, and finally in 1842. None of the others have ever been in use — the *fi. fa.* issuing both against lands and goods, and directing alike the *sale* of both. Upon a judgment against a corporation, the plaintiff may have either a *distringas* or *fi. fa*[32]

The writ of possession and the *fieri facias* are the two ordinary executions — the one to obtain the possession of specific property recovered, the other to obtain money, the general representative of all other property, and also property itself One writ may combine the character of both. When a party recovers property, he also recovers damages for its detention and costs The writ to carry this judgment into execution would command the sheriff to deliver the property recovered, and to make the damages and costs out of the defendant's property. But the judgment goes farther; besides damages and costs it gives to the plaintiff in detinue and the defendant in replevin the value of the property, if the property is not returned.

Now, a writ that would pursue this judgment, and carry it at once into complete execution, would be like the judgment in the alternative — it would command the sheriff to take the goods and deliver them to the recoverer; or, if the goods cannot be had, then to make the assessed value out of the delinquent's property.

If a writ of possession issued without the alternative of levying the value if the goods were not delivered, it would have to be returned in the event of a failure to get them, and then a *fi. fa.* issued for their value.

This would be doing manifest injustice to the plaintiff If the property has been sold, or run off, or is concealed by the defendant, he ought not to have the advantage of this delay from his wrong; if it has perished, the writ of possession is an idle form. In either case the plaintiff

32. § 3716, M & V.

ought to have the value at once if he wants it, and the sheriff can as well make it under an alternative command of the first writ as upon a second. There can be no necessity for a *return* of the writ of possession to ascertain that the property cannot be had. The return only shows what the sheriff had found out before he made it; and why not have the alternative in the writ, so that when he does find it out, he can at once make the money? Every *fi. fa.* has an implied alternative — the sheriff is to make the money out of personalty, if to be found; if not, then he is to make it out of land.[33]

§ 7. It is the duty of the clerk to issue executions in favor of the successful party as soon after the adjournment of the court as practicable, and within the time prescribed by law In Tennessee the clerk of the Supreme Court must issue them within sixty days after the adjournment of each term, while the clerks of the Circuit and Chancery Courts are required to issue them within thirty days after adjournment, if the term continues less than two weeks, and within forty days thereafter if it continues more than two weeks Upon good cause shown by affidavit the clerk is required to issue executions at any time during the term or after the adjournment[34]

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33. § 3739 M & V, Savers *v* Holmes, 2 Coldw 264, Tidd Pr. 993, 1038 In Waite *v* Dolby, *supra*, the case was detinue and judgment for the plaintiff in the alternative *Fi fa* issued alone for the damages without allowing the defendant the alternative of returning the property This was held erroneous This case is not authority for saying the writ of possession must first issue and be returned before *fi fa* can issue although it does contain *dicta* to that effect. The principle settled by the case is that where the judgment is in the alternative the execution must be also, and this is consistent with the text

34 §§ 3718, 3724, M & V At common law executions issued only on order of the court, which was called *awarding execution* In our practice the rendering of judgment is an award of execution and if the original is returned unsatisfied the judgment awards an *alias* and *pluries* until satisfaction is obtained Johnson *v* Ball 1 Yerg 291, Daley *v.* Perry, 9 Yerg 444, Bank *v* McClung, 9 Humphr 94

If issued during any term of the court, executions are tested the first day of that term; if afterward, they are tested the first day of the term preceding their issuance. This was a common-law rule The theory was that they were awarded by the court, and the court could only award them when in session.[35] It may thus happen, and very often does, that the execution is tested a day before the judgment was rendered.

The clerk is also to indorse on it the actual date of issuance and also the date and amount of the judgment, and the items of the bill of costs written in words, and the amounts in figures. He is also to enter upon his execution docket the date of its issuance, and to what county and officer issued.[36] This will furnish evidence of the fact should the execution fail to be returned.

The officer to whom it is issued must indorse on it the day when it came to his hands, and give a receipt for it if required.[37]

§ 8. The execution is process having the style, the address, and the teste the same as the original summons. Its form is as follows:

Form of Fi. Fa.

The State of Tennessee to the Sheriff of Wilson County:

You are hereby commanded that of the goods and chattels, lands, and tenements of A B, you make the sum of one thousand dollars and the costs hereon indorsed, to satisfy a judgment that C D recovered against him, in the Circuit Court of Wilson county, on the 1st day of October, 1888, and have you said moneys, together with this writ, at said court, to be held at the courthouse, in Lebanon, on the second Monday in January next Witness, S G Stratton, clerk of said court, this second Monday of September, 1888.

S G STRATTON,
Clerk

35. § 3717, M & V, Schaller *v* Wickersham, 7 Coldw 376, Johnson *v* Ball, 1 Yerg 292, Daly *v* Perry, 9 Yerg 442

36 §§ 3729, 3730, M & V, Warden *v* Millard, 8 Lea, 581

37. §§ 3732–3738, M & V.

The execution may be directed to any county in the State. Whether a party could at the same time have two writs running to different counties, might be a question of interest to him, where property was to be found in different counties, but not enough in any one to satisfy the judgment, and where, too, there is danger of its being eloined before an *alias* could issue. Tidd says, "He may have several writs of the same sort running at the same time in order to take the defendant or his goods, etc., in different counties." If, upon one execution, satisfaction was obtained, and the plaintiff were persisting in the other, it might be superseded on petition to the judge.[38]

§ 9. The command of the writ is that the sheriff make the money out of the defendant's property His first duty therefore is to hunt for property. It is his duty "to use in the execution of process a degree of diligence exceeding that which a prudent man employs in his own affairs"[39]

§ 10. It is now necessary to inquire what property is subject to the levy of an execution. In all the States there are statutory regulations known as the exemption laws, by the provisions of which certain property is exempt from the levy of attachment or execution for debt. The student should consult the statutes of his own State for information in detail as to what property is included under the head of exemptions. Omitting property exempt, all the legal estate of the defendant is subject to the levy of an execution. And in some cases property

38. Tidd Pr. 995 The right to several executions at the same time running to different counties is not definitely settled in Tennessee In one case the decision of the question was waived Parish *v.* Saunders, 3 Humphr 433. In a later case (Wiseman *v* Bean, 2 Heisk. 392) it was said, *obiter dictum*, to be irregular.

39 § 4868, subsec 7, M & V. This provision of the Code was intended doubtless to fix on the sheriff the highest degree of diligence and does intensify the rule as previously stated in Harwell *v* Worsham, 2 Humphr. 524; Trigg *v.* McDonald, 2 Humphr. 386, and Snell *v.* State, 2 Swan, 344.

which has ceased to belong to the defendant may be levied on thus: where the debtor conveys his land while it is subject to the judgment lien, the execution may be levied upon it, although the conveyance was in good faith and upon a valuable consideration, and the purchaser had no actual knowledge of the existence of the lien. This right, however, of the creditor to pursue the land with his execution under such circumstances, as against the rights of the purchaser, depends upon his diligence, for if he neglects to make the levy and sell the land within one year from the rendition of the judgment, the right to do so is gone, that period, as before stated, being the statutory limitation of a judgment lien.[40] And again, the execution being a lien from its teste day upon personal property, if since its teste, although before the actual day of its issuance, the defendant has sold the property, the sheriff is to levy upon it, if he can find no other property, no matter how honestly or for what consideration it was conveyed.[41] There is one exception. if the execution is tested the first day of the term at which judgment was rendered, and the judgment was rendered at a subsequent day of the term, an honest sale of the property between the teste and the date of the judgment will be good, and the property exempt from the execution.[42]

The death of the defendant between the teste and the actual day of issuance does not affect the right of the plaintiff in the execution in so far as he is seeking to subject personal property. He is still entitled to proceed with the levy and sale. It is true the writ commands the sheriff to make the money out of the defendant's property;

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40. § 3696, M & V.

41. Bank *v.* McClung, 9 Humphr 92, Barnes *v* Hays, 1 Swan, 304, Evans *v* Barnes, 2 Swan, 292 But as to realty the lien of the execution dates from the levy and not from its teste. 6 Lea, 382, 1 Pickle, 676.

42. Berry *v.* Clements, 9 Humphr 312, 1 Pickle, 720

and that by his death, what was his property has ceased to be his, yet it was his property at the teste of the writ, for he was then alive, and the command of the writ relates to that time, and what was then his is liable to it, whether transferred by his own act, or by the law, to his representative. But not so as to real property. The execution is not a lien upon lands until it is actually levied, and then only from the date of the levy. And in any case upon the death of the debtor before sale his lands descend to the heir in whom the title is vested by law, and it is necessary that he should in some form have a hearing before his estate could be subjected to the debt of his ancestor. The creditor must in such case proceed by revivor against the personal representative and the heir, and only in default of personal assets could he subject the land to the payment of his debt [43]

§ 11. The *fieri facias* is legal process, it emanates from a court of law, and is to carry into execution a judgment at law It therefore reaches no property which is not recognized as property by a court of law. It leaves the merely equitable interests that a defendant may have in property, to be administered in a court of equity as equities of redemption in land; the interest of a purchaser in land, under a covenant to convey; interests in land held by a trustee for some special purposes which are yet unfulfilled.[44]

But where it is a simple or passive trust in land for no special purpose, the trustee having no duty to perform, but the land is simply conveyed or willed to A. for the use of B, then an execution against B. may be levied on it. So if it is for a special purpose, and that purpose has

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43 Overton *v* Perkins, 10 Yerg 328, Rutherford *v* Read, 6 Humphr 423; Harrell *v* Harrell, 4 Coldw 379, 6 Lea, 60, 383, 1 Pickle, 676

44. Chapman *v* Cassidy, 3 Humphr 661, Birdwell *v* Cain, 1 Coldw. 300; Hurt *v* Perry, 5 Hayw (Tenn) 50; 4 Yerg. 218.

been fulfilled, as if it be for the payment of a debt, and the debt has been paid, it may be levied on by virtue of an execution against the grantor in the deed of trust.[45]

§ 12. The terms *lands* and *tenements,* in the execution, embrace reversions and vested remainders. They are to be levied on as well as estates in possession.[46] Entries and locations of public lands give mere equitable titles; the enterer or locator has the same sort of title that a vendee has under the covenant of his vendor to convey, he has the covenant of the State as contained in the land law, that he shall have a grant, on complying with all the conditions prescribed in the law; it is the grant or patent that gives him a legal title. Lands thus held would not be liable to execution, but for the express enactment of the statute.[47] Lands held by unregistered deed may be levied on, because the legal title has passed out of the grantor, and is in the grantee, though not fully perfected in him till registration. So, although the lands are not in defendant's possession, but are held adversely by a stranger, they may be levied on and sold.[48]

§ 13. Money may be levied on as well as specific property. And money in the hands of the sheriff, collected on an execution in favor of a party, may be applied by him to the payment of an execution in his hands against that party The only object of levying on and selling property is to obtain money, and if the sheriff can get the money itself in the first instance, the whole design of the execution is answered. He may return on the execution in favor of a party, that he has collected the money, and applied it to the execution against him.[49]

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45 Carter *v.* Taylor, 3 Head, 30, Hannum *v* Wallace, 4 Humphr 143

46 Kelly *v* Morgan, 3 Humphr 437

47 § 3746, M. & V.

48 Shields *v* Mitchell, 10 Yerg. 1, Vance *v.* McNairy, 3 Yerg 171

49. Dolby *v.* Mullins, 3 Humphr. 436.

§ 14. Growing crops were liable to be levied on at any time by the common law, and so in fact was every sort of personal property except the debtor's necessary wearing apparel.[50] But by statute in Tennessee, growing crops cannot be levied on until the 15th of November after their maturity, unless the owner absconds, conceals himself, or leaves the country.[51]

§ 15. The sheriff to whose hands an execution comes is to make the levy, by himself or his deputy, unless he goes out of office before he finds property, and then he is to deliver it to his successor.[52] But if he has levied on personal property, he is to go on and sell and collect, and return the money and the process, although his term of office may expire.[53]

§ 16. If several executions come to the sheriff's hands of the same teste, no matter when they are delivered to him, they are equally entitled to satisfaction, and if he cannot find property enough to satisfy all, the money he makes is to be divided among the plaintiffs in proportion to the amount of their judgments.[54] But if they come from different courts bearing different testes, that which bears the oldest teste is to be satisfied in full, and the residue, if any, appropriated to the younger executions.[55] There is one exception made by statute: where an execution issued by a justice of the peace is actually levied on property before an execution from a court of record, it shall have the preference of satisfaction, although the court execution is older than the justice's execution.[56]

§ 17. The levy is made on land by simply writing the fact on the execution, that it is levied on it. It must be

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50. Tidd Pr 1001 51 § 3749, M & V
52 § 424, M & V, Todd *v* Jackson, 3 Humphr 397, State *v.* Head, 610
53. Campbell *v* Cobb, 2 Sneed. 20
54. Porter *v* Earthman 4 Yerg 358.
55. Johnson *v* Bell, 1 Yerg 291, Coffee *v.* Wray, 8 Yerg 464
56 § 3791, M & V

sufficiently descriptive of the land to distinguish it from other tracts. The object of requiring this certainty of description is: 1. That the purchaser may know what land is to be sold, so as to form some estimate of its value. 2. To prevent the sacrifice of the defendant's property by reason of the uncertainty as to what land is sold. 3. To prevent one tract from being sold, and another conveyed by the sheriff to the purchaser, which might be done if the levy were broad and ambiguous enough to apply to either of two distinct tracts.[57] The omission to state the county in which the land lies, is not considered as an uncertainty that vitiates the levy. It is not to be supposed that the sheriff goes out of his county to levy on land.[58]

§ 18. A levy on personal property is made by the officer's taking the goods into his possession. And for this purpose he may forcibly overcome any personal resistance, and call the *posse comitatus* to his aid He cannot break open the outer doors of the debtor's dwelling, but the outer door being open, he may break open the inner doors, and any trunks or safes in which money or other property may be found. He may also break open outhouses, not so connected with the dwelling as to constitute a part of it. If the debtor's goods are in the possession of a stranger, he may break open the outer doors of his dwelling to get them, if admittance or delivery of the goods is refused him on demand.[59]

§ 19. Personal property is to be levied on first; and if enough of that can be found to satisfy the debt, the land is not to be touched. But he may levy upon both at the same time, when he considers the goods insufficient. And even after he has levied on land, if he discovers personal property, he must levy on and sell that before he sells the

57. Gibbs *v.* Thompson, 7 Humphr 179, Easly *v.* McLaren, 1 Baxt. 2

58 Wright *v* Watson, 11 Humphr. 529

59. Tidd Pr. 1012. 2 Hill Torts, 86, Etheridge *v.* Edwards, 1 Swan, 426, Tyler *v.* Dunton, 1 Tenn. Ch 367.

land. The principle is that the personalty is to be exhausted before the realty is resorted to, but the sheriff may make sure of enough by levying on both at once.[60]

§ 20. If there be several defendants the whole property, real and personal, of any one of them may be exhausted by the sheriff without resort to either of the others. And it is equally so where one may be surety or indorser for the other, unless that fact appears in the judgment. But a surety or indorser may show that fact, and have it inserted in the judgment; and the clerk is to insert it in the execution. It then becomes the duty of the sheriff to exhaust the whole property, real and personal, of the principal first, and if his property is insufficient, the sheriff is to resort to the property of the others in the order of their liability.[61]

§ 21. A levy on personal property discharges the defendant to the extent of the value of the property; if it is of sufficient value to pay the debt, it is an entire discharge It is as complete a payment as if the creditor had authorized a private agent to take property in satisfaction of the debt, and the defendant had delivered it to the agent, and he had accepted the property in full discharge. In that case the creditor would have to look to his agent for his debt. The sheriff is a public agent, and the execution is his power of attorney to take property enough to pay the debt; when he does it the debtor is discharged, and the creditor must look to the sheriff for payment.[62] If it is attempted afterward to make any surety of the debtor liable for the debt, he may plead this levy as a defense; he is discharged by it, whatever may be done with the property by subsequent dealings with it by the other parties concerned.[63]

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60. § 3739, M & V, 5 Yerg 227 7 Heisk 467 4 Lea 403
61. Crowder *v* Sims, 7 Humphr 257, §§ 3741–3744, M & V, Hassell *v* Bank 2 Head, 382
62. 3 Hayw 144 5 Heisk 710; 2 Sneed 656, 5 Humphr 496
63. 3 Humphr. 419; 8 Humphr 26

But if the defendant retains or regains the possession of the property by consent of the plaintiff, and disposes of it, or keeps and uses it as his own, he cannot insist that the levy was a payment It would be absurd for him to insist that the debt was discharged by a levy on property which had been returned to him or never taken from him.[64]

The sheriff acquires by the levy a special property in the goods, and may sue anybody for them who takes them from him, or from the agent to whom he has intrusted the keeping of them.[65] He holds it, however, for the plaintiff's benefit, who may waive or release his hold or lien at any time. "But such waiver must be distinctly and clearly proved." It is not sufficient evidence of waiver that the *fi fa.* levied was returned, and an *alias* issued, which was again levied on the same property. This relevy was a merely nugatory act, the first levy held it, and he might have sold the property without another writ.[66] If the plaintiff assents to a conveyance of the property by the defendant to himself, or anybody else, to secure the payment of the debt, and upon this the execution be returned satisfied or unsatisfied, this discharges the lien of the levy, or, in other words, the sheriff's special property; and then any other execution of a teste prior to this conveyance may be levied on the goods.[67]

§ 22. At common law the sheriff had to take the goods levied on out of the defendant's possession, and keep them at his own risk until he sold them. This was often a great inconvenience both to the defendant and the officer. It is remedied in the United States generally by allowing him to take what is usually called a *forthcoming bond,*

64 Carns *v* Picket, 2 Sneed, 656; Williams *v.* Bowdan, 1 Swan, 282, Charlton *v* Lay, 5 Humphr 496, Fry *v.* Manlove, 1 Baxt 257, Hunn *v* Hough, 5 Heisk. 710

65. Malone *v* Abbott, 3 Humphr 533, Evans *v* Barnes, 2 Swan, 293

66. See last case, also Lester's Case, 4 Humphr 383

67. Daly *v* Perry, 9 Yerg. 442, Sandeford *v* Hess, 2 Head, 683.

but more commonly, in our nomenclature, a *delivery bond.* Upon the execution of this bond the defendant is allowed to re' ain the property until the time stipulated for its delivery to the sheriff, which is to be by twelve o'clock noon of the day of the sale.[68]

The bond is to be payable to the plaintiff, and in double the amount of the execution; but the securities are only to be liable for the value of the property. Its value may be either agreed on or ascertained by five disinterested men summoned by the sheriff, and the amount inserted in the bond. The condition of the bond is that the property be delivered to the sheriff by twelve o'clock on the day of sale.[69] If the property is not delivered, the bond is said to be *forfe 'ed.*

The taking of the delivery bond is no relinquishment of the lien acquired by the levy. The sheriff's control and special property is gone, to be sure. He can maintain no action for it. It is placed by force of law in custody of the defendant. But it is necessary to preserve the lien of the levy to enable the sheriff to sell it.[70]

But when the bond is forfeited the lien of the levy vanishes, and it requires another levy on the goods to enable the sheriff to sell.[71] The rights acquired by the levy are merged in the judgment on the delivering bond.

The forfeiture of the bond confers upon it the dignity of a combined judgment and execution against the securities; for the sheriff may immediately proceed to levy upon the defendant's property, and if he cannot find enough of his, he may levy the balance upon the property of the securities to the amount for which they are liable in the bond. And if he cannot obtain full satisfaction before the execution has to be returned, he returns the bond with

68. § 3757, M & V.
69 § 3758, M & V
70 Malone *v* Abbott, *supra;* Lester Case, *supra*
71. Malone *v.* Abbott, *supra,* Lester Case, *supra.*

it; and the clerk, without any motion or judgment, issues an *alias* against the defendant and his securities for the balance. No second delivery bond is to be taken; for the parties to the first have proved themselves too unreliable to be trusted again.[72] Nor is a delivery bond to be taken on an execution against an officer for money he has collected in his official character and failed to pay over.[73]

If there are more defendants than one, and one does not join in the delivery bond, his property is to be exempt from liability upon the forfeiture of the bond, until the property of the other defendant and his sureties in the bond is exhausted.[74]

It is this recourse which the plaintiff takes on the securities in the forfeited bond that emancipates the property from the lien of the levy. It must be levied on again to subject it to sale, but it is, of course, just as liable to the levy of any other execution.

§ 23. The levy on land is made by simply writing the levy on the execution. It does not at all interfere with the defendant's possession; he continues seized of it as before; as it cannot be removed, there is no use in taking it from him. And as he has not been deprived of his property the debt is not discharged by the levy. If the sheriff after the levy discovers personal property, he must take that, and, if there is enough of it, abandon the levy on the land.[75] It is the inception of a right to satisfaction out of that particular tract. Before the levy there is a *general lien* on all the defendant's property; the levy locates the lien on the particular property, making it a *specific lien.*

§ 24. When the title to property is disputed, the officer is not bound to levy upon it, but, if he has levied upon it,

72. § 3763 M & V. 73. § 3764, M & V.
74. § 3760, M & V.
75. § 3739, M & V., Hogshead *v.* Caruth, 5 Yerg. 227; McGavock *v.* Schneider, 7 Heisk. 467.

he is not bound to sell it, unless the plaintiff will give him bond and security to indemnify him against all damages and costs in consequence of the levy or sale.[76] And he is not bound to levy or sell, even after such bond is given. But if he does not, and the execution is returned no property found, he is liable to the plaintiff's action for a false return; but it will be a good defense to that action that the property really did not belong to the defendant.[77] The principle of the common law was that the sheriff had to decide at his own peril whether the property belonged to the defendant; if it really was his, he was liable to the plaintiff for refusing to levy on it, if it belonged to a third person, he was liable to him if he did levy on it. The statute enables him to throw this responsibility on the plaintiff by demanding indemnity of him against liability to an adverse claimant. He will be liable to the action of the owner of the property; but should damages be recovered against him, he can immediately have judgment by motion against the obligors in the indemnity bond. By refusing to levy or sell after bond given or tendered, the sheriff puts himself on the common law, taking on himself the risk which he might have thrown on the plaintiff.[78]

§ 25. The object of the levy is to make the money out of the property by the sale of it. There ought therefore to be public notice of the time and place of sale, and the kind of property to be sold, so as to bring in bidders; otherwise the property might be sacrificed, to the great injury both of the debtor and creditor.

As to land sales, if there is a newspaper in the county, the advertisement of sale is to be published at least three times in it, the first time to be at least twenty days before the sale. If there is no newspaper published in the county, or if the printer refuses to publish for the fees allowed by

76 § 3745, M & V
77. Hamlet v Herndon, 3 Humphr 35.
78. Saunders v Harris, 4 Humphr 72.

law, or the defendant forbids the publication, then the sheriff is to advertise by written notices posted up in at least five of the most public places in the county, one being the courthouse door, and another the most public place in the civil district where the land lies.

The advertisement is to give the names of the plaintiff and defendant, the time and place of sale, and a brief description of the land or property. The failure of the sheriff to advertise as required will not invalidate the sale; but it subjects the officer to indictment, and also to the action of the injured party for damages Such are the provisions of the Code of Tennessee [79]

As to personal property the regulations are the same, with the following exceptions: 1. The newspaper advertisement is not required. 2 The advertisement need be only ten days before the sale. 3. As to a constable's sale, if he does not reside in the courthouse district, he need not advertise at the courthouse door.[80]

§ 26. "If the defendant is in the actual possession and occupation of the land," the sheriff is to serve him with written notice, at least twenty days before the sale, stating that the land is levied on, and the time and place of sale. The consequence of his failure to give this notice is much more serious than the failure to advertise properly, it totally invalidates the sale, so that the purchaser of the land acquires no title.[81]

Where there are three adjoining tracts held by separate titles, and all are levied on as one, the defendant being in possession of one only, not having the required notice, does not invalidate the sale as to the others.

A purchaser from the defendant after the date of the

79 §§ 2969–2979, M & V
80. §§ 3752, 3754, M & V
81. § 3755, M. & V. Trott *v* McGavock, 1 Yerg 469; Loyd *v.* Anglin, 7 Yerg 428· Mitchell *v* Lipe, 8 Yerg 179; Farquhar *v.* Toney, 5 Humphr. 502, Prater *v* McDonough, 7 Lea, 672

levy may insist on the invalidity of the sale for want of the notice, as well as the defendant himself.[82]

The notice must be served on the defendant personally; or, if he be absent, so that it cannot be actually served, it must be left for him in proper hands at his residence, so that he may get it. Putting up a notice at his shop door will not do. Serving it on his tenants will not do.[83]

If the record fails to show whether or not the defendant was in possession, that fact must be first shown by one who would impeach the title of the purchaser. There has to be a presumption that he was or was not in possession, and it ought to be in favor of the title acquired under the levy. When it appears that he was in possession, the recital in the sheriff's deed that the land was advertised and sold according to law, will be *prima facie* evidence that the notice was given; every sworn officer is presumed to have done his duty. But even where he expressly recites in his deed that notice was given, it may be shown that it was not.[84]

As the notice is for the defendant's benefit, he may waive it either expressly or by his conduct. His telling the sheriff, however, to levy on one tract rather than another, is no waiver, this only shows a knowledge of the levy, but not of the time and place of sale. And his mere presence at the sale, and not objecting to it, is no waiver. He must by some act promote or assist the sale, so that it would be a manifest fraud on the purchaser to allow the defendant afterward to impeach a title which he had induced another by his own conduct to acquire.[85]

§ 27. The sale is to be between ten and four o'clock [86]

82 5 Humphr 502

83 Richards *v* Meeks, 11 Humphr 455; Lafferty *v* Conn, 3 Sneed, 222

84. Simmons *v* McKissick, 6 Humphr. 260, Childress *v* Harrison, 1 Baxt 413

85. Noe *v* Purchapile, 5 Yerg 215, Carney *v* Carney, 10 Yerg 491; Mitchell *v* Lipe, *supra*.

86. § 3751, M & V.

Personal property must be present.[87] Purchasers could form no just estimate of its value, and it might be sacrificed, so as to injure both the creditor and the debtor — the former by not receiving its value in payment of his debt, the latter by leaving the unpaid balance a charge upon his other property. But the debtor may waive objections to its presence so as to preclude him from complaining.[88]

§ 28. The land sold may or may not be present It may be sold on the premises, or elsewhere. Not only the time, but the place of sale is designated by the sheriff in his advertisement, or notice to the defendant in possession. The defendant may have the land sold in lots, by delivering to the sheriff, before ten o'clock, a plan of the division described by him, and dated since the date of the advertisement. The sheriff is then to sell the lots until the execution is satisfied. The balance of the land, if any, is discharged from the levy. If no such plan of division is furnished by the defendant, the sheriff may sell it without division.[89]

§ 29. The title to personal property passes at once to the highest bidder whenever it is knocked off to him by the sheriff, unless he has previously withdrawn his bid It remains at his risk, so that if it perishes before delivered, it is his loss[90] But the title of the purchaser is subject to this condition, that if he does not pay the bid, the sheriff may resell the property. There is no warranty of title in a sheriff's sale The purchaser takes it at his own risk, and it is no defense to an action for the price bid, that the defendant had not a good title The purchaser buys whatever title the execution debtor has, and no more.[91]

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87 § 4868, subsec 17, M & V
88 Gift v Anderson, 5 Humphr 577
89. § 3756, M & V
90 Shaw v Smith 9 Yerg 97
91. Shaw *v.* Smith, *supra;* Arendale *v* Morgan, 5 Sneed, 716; Bostic *v.* Winton, 1 Sneed, 541

§ 30. When the sheriff levies upon and sells turnpike or railroad stocks, he is to execute an assignment of the shares sold, and, on presenting the assignment to the proper officer, the secretary of the company usually, he shall transfer the shares on the books to the purchaser The sheriff's return of the sale on his execution is notice of the sale to all the world [92]

§ 31. On the sale of land the purchaser is entitled to a certificate from the sheriff stating: 1. The fact of sale. 2 The date of it. 3 The amount bid. 4. The execution under which it was sold. 5. A description of the land as given in the levy. Or he may if he chooses demand a deed.[93] But as the debtor has two years to redeem the land, it is not usual to demand a deed until that time is out.

The possession of land is not delivered to the purchaser, as personal property is. The debtor retains the possession until the purchaser obtains a deed, and then if he does not voluntarily surrender it, the purchaser can only obtain it by an action of ejectment.

§ 32 The evidence of his title in the action of ejectment will be: 1. The judgment, including the summons, the returns on it, and the pleadings These proceedings are necessary to show that the court had he parties properly before it, so that it could render the judgment. 2 The execution. This is the sheriff's power of attorney to levy on and sell the land. 3. The levy of the execution on the land. This consists in the sheriff's writing on the execution the fact that he levies it on the land. It is necessary therefore that the execution should have this indorsement on it, as it is the very fact which constitutes the levy. A levy on goods may be shown without any such indorsement, for the seizure of them is the fact which constitutes the levy; and if you show an execution and a seizure under

92 § 3765, M. & V. 93 §§ 3766, 3768, M & V.

it, you show a levy. 4. Twenty days' notice to the defendant, if he was in possession of the land The failure of the sheriff to advertise the sale, as required by law, does not vitiate the sale, and therefore the advertisements need not be shown.[94] 5. The deed of the sheriff, which shows that he sold the land to the plaintiff. The deed must, like all others for land, be proved and registered.

§ 33. Choses in action, that is, outstanding rights in favor of the debtor, as bills, notes, etc., payable to him, could not at the common law be levied on. To a limited extent, this may now be done. Stocks in turnpike and railroad companies are declared to be personal property and subject to levy and sale by execution. So where the judgment is against a corporation, the execution may be levied, not only on its tangible property, but also upon its choses in action, its notes, and debts of every kind. But by another proceeding called garnishment, the restrictions existing at the common law are entirely avoided, and every outstanding legal right of the defendant may be subjected to the payment of his debts. Under this proceeding, if the sheriff cannot find property sufficient to satisfy the execution,[95] he may summon in writing any person as garnishee, to appear at the next term of the court, and answer on oath:

1. Whether he is indebted to the defendant; and if so, how, and how much.

2. Whether he has in his possession or under his control, any property, debts, or effects of the defendant; and if so, the kind and amount

3. Whether there are, to his knowledge or belief, any property, debts, or effects of the defendant, in the possession or under the control of any other person; and if so, what person and what kind of property.[96]

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94. § 2976 M & V, Jones v. Bank, 3 Humphr 76, Childress v. Harrison, 1 Baxt 415

95. § 3814, M. & V

96. §§ 3800, 3801, M & V.

The garnishee is to appear as summoned at the return of the execution and garnishment, and answer any questions that may be propounded by the plaintiff to elicit information as to the above facts. And any property or debts that may appear to be in his hands shall be liable to satisfy the execution. For debts the garnishee himself may owe the defendant, judgment shall be rendered against the garnishee. For property he may disclose, execution may issue and be levied on it. If his answer to the third inquiry discloses the fact that other persons owe the defendant or have his property, they may be summoned as garnishees. If he discloses property and fails to deliver it to the sheriff on execution issued, judgment shall be rendered against him on the return of the execution showing his failure

If he fails to appear and answer, a conditional judgment by default is taken against him, upon which a *scire facias* issues, and if he does not then appear and show cause for his former failure, the conditional judgment will be rendered absolute.

If the garnishee's answer discloses debts on others in favor of the defendant in his hands, he must surrender them to the clerk or to whatever other officer the court may direct, to be sold for what they will bring, or to be collected and applied to the payment of the judgment. If the garnishee himself owes debts to the defendant, not yet due, judgment will be rendered against him for the amount, but execution stayed till they become due. The answer of the garnishee is not conclusive where the sum in controversy is under one thousand dollars. If over that sum, it is conclusive [97]

§ 34. When the term of the court arrives to which an

97. § 3816, M & V , Mayor *v* Insurance Co., 2 Bax. 302; Connor *v* Allen, 3 Head, 418.

execution is made returnable, the sheriff is to return it on the first day of the term.[98]

The return means two things: 1. The bringing of the writ back to the office from which it issued. 2. The indorsement on it by the sheriff of what he has done under it

If the sheriff does not, in this legal sense of the term, return the writ, the plaintiff may, by motion, obtain a rule or order of court compelling him to do it. The refusal of the sheriff to return the writ would be a "willful disobedience" to "a lawful writ," and a contempt of the court. And if, when ordered to do it on motion, he failed to do so, he might be imprisoned until he did do it.[99] But ordinarily, the plaintiff would prefer the more satisfactory remedy of a summary judgment against the sheriff and his securities for the amount of the debt.

The law prescribes what indorsements the sheriff shall make on the execution He is to indorse the day he received the execution, the levy, sale, or other act done by virtue thereof, with the date, and the dates and amounts of any receipts or payments in satisfaction thereof; and he is to make these indorsements at the time of the receipt or act done. The clerk is to enter this return on the execution docket [1]

A due or sufficient return is one which shows that the sheriff has done what the writ commanded him to do, or some good reason why he has not done it.[2] The command of the writ is, that he make the money out of the defendant's property His return that he has made the money is a return of obedience to the command. If the defendant has paid him the money without any levy on property, he usually returns on the execution: "Satisfied" If he

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98 § 3735, M & V

99. Philips v Cunningham, 5 Yerg 416

1. §§ 3730, 3732, M & V

2 Bank v Barnes, 10 Humphr 244, McCrory v. Chaffin, 1 Swan, 307, Wingfield v Crosby, 5 Coldw. 248

has made the money by a levy and sale of property, he returns the facts. If he does not return the money made, he must return a good legal excuse for it. To return that the money is not made, or the execution not satisfied, is not sufficient; it does not show why it is not made. So the return, "Came to hand the day issued, and nothing made, for lack of time," is insufficient, although there was not time before the return day of the writ to give the ten days' notice required for the sale of property, if it had been levied on the day he got the execution. It was his duty to levy on property if he could find it, and sell it after the return of the execution. So a return that he had levied on property, without showing what he had done with it, was held insufficient. In that case, the sheriff really took a delivery bond, and it was forfeited, but he did not state that fact in his *return* as the reason why he had not sold the property; and the return alone can be looked to for the reason why the money is not made.[3]

Sometimes the plaintiff in the execution tells the sheriff not to proceed with it. The return of that fact is sufficient.[4]

The ordinary excuse for not making the money is, that no property can be found. It is commonly called the return of *nulla bona* — no goods. It acquired that name when an execution only issued against goods. Now they issue against lands and goods, and the return must show that no property is to be found. If only a part of the debt is made, the return ought to show why the balance is not made, as that no more property could be found. The return must be a "sufficient response" to the whole writ, not to a part only.[5]

§ 35. The sheriff is not only to return the execution to

3. Bank *v.* Barnes, 10 Humphr. 244, McCrory *v.* Chaffin, 1 Swan, 307, Wingfield *v.* Crosby, 5 Coldw. 284.
4. State *v.* McDonald, 9 Humphr. 607.
5. Trigg *v.* McDonald, 2 Humphr. 388.

the clerk, but the money collected under it. The clerk is to enter on his execution docket the amount received and the date of its reception. And he must pay it out to the party entitled to it when called for. He is also to enter on his execution docket the date and amount thus paid out.[6] As the execution has to be returned the first day of the term, and the money has to be returned with it, the money must be paid over to the clerk the first day of the term. The sheriff may retain his own fees, and the clerk may retain his, together with the other costs. If the property levied on has brought more than is sufficient to satisfy the execution, the balance is to be paid over to the defendant.

Before the return of the execution to the clerk, the sheriff may have paid the money to the plaintiff; and if he has, that fact should constitute a part of his return. Although the writ commands him to have the money at court, yet it is his express duty "to pay to the party entitled to the same, or his agent or attorney, *on demand,* all moneys collected by him on any execution from a court of record." The law therefore is, that if the money is demanded of him by the party entitled to it before the writ is returnable, he is bound to pay it to him; if not, he is bound to pay it to the clerk.[7] And payment to one of the creditors is payment to all.[8]

§ 36. The sheriff may receive only money, or, unless otherwise instructed, current convertible bank notes in satisfaction of any writ or execution placed in his hands.[9] Of course, where the plaintiff has given no such instructions, he is bound to receive the convertible bank notes collected.[10]

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6 §§ 3730, 3738, M & V. 7 § 4868, subsecs 23, 28, M & V
8. Erwin *v* Rutherford, 1 Yerg 169
9. § 4864, subsec 9, M & V
10 Crutchfield *v* Robins, 5 Humphr 15 As to what is money, see last case and 6 Humphr 306, 5 Humphr. 41, 4 Coldw. 262, 1 Heisk 317, 9 Heisk 694, 2 Heisk 453, 7 Heisk 495

§ 37. If the return of the execution shows that the money has not been made, the plaintiff is entitled to an *alias*. If part has been made, he is entitled to an *alias* for the balance. If the *alias* is not satisfied, he is entitled to a *pluries*, and so on, until he obtains satisfaction. But no *alias* or *pluries* is to issue until the previous execution is returned or satisfactorily accounted for by affidavit.[11] This provision is held to be directory only.(*a*)

§ 38. If the return is, that property is levied on, but for any reason not sold, the plaintiff may have a *venditioni exponas*, commanding the sheriff to proceed and sell it. If personal property is levied on, a *venditioni exponas* is not necessary. On the levy, the sheriff takes possession of it, and a special property in it vests in him, and the execution is satisfied to the extent of the value of the property, and the sheriff becomes responsible to the plaintiff. He may therefore proceed to sell it after the return of the execution, and even after he goes out of office.[12] But a levy on land does not vest the property or possession in the sheriff; it is no satisfaction of the execution; and he has no right to sell it without a *venditioni exponas*.[13]

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11 § 3733, M & V (*a*) 2 Heisk. 301; 12 Heisk. 235.
12. Campbell *v* Cobb, 2 Sneed, 18
13. Overton *v* Perkins, 10 Yerg 328

CHAPTER XII.

APPELLATE JURISDICTION OF THE CIRCUIT COURT.

§ 1. The Circuit Courts have appellate jurisdiction of all suits and actions, of whatsoever nature or description, instituted before any inferior jurisdiction, whether brought before them by appeal, *certiorari*, or in any manner prescribed by law. It is proposed in this chapter to discuss this jurisdiction as it is exercised over causes originating before justices of the peace. There are two modes by which such cases are removed into the Circuit Court; one by simple appeal, and the other by *certiorari* in lieu of an appeal These will now be discussed in the order named.[1]

APPEAL FROM JUSTICE.

§ 2. Any person dissatisfied with the judgment of a justice of the peace in a civil action, may, within two entire days thereafter, Sundays excepted, appeal to the next Circuit Court.[2] The appellant is not bound to assign any reason for appealing; it is enough that he is dissatisfied with the judgment, whether it is for or against him; and when the case goes up to the Circuit Court, it cannot be dismissed for want of an assignment of reasons. None are to be assigned.[3]

There may be several plaintiffs or defendants, and then any one or more of them may appeal, leaving the judgment in full force against the others.[4]

The whole of the two succeeding days after the day of judgment are allowed for taking the appeal, and if one

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1 § 5006, M. & V
2 § 3856, M & V.
3. § 3877, M. & V.
4. § 3876, M. & V.

of them is Sunday, the appellant is allowed another day, so that if the judgment were rendered on Friday, he would be allowed the whole of Monday.

The appeal must be to the Circuit Court and no other, and to the next term of that court; there can be no appeal to a subsequent term.

Before the appeal is granted, the person appealing shall give bond with good security for the prosecution of the appeal.[5] The bond must be given within the two days allowed for the appeal.[6]

When the appeal is properly prayed and granted by the justice, he ceases to have any further jurisdiction of the case. His judgment is abrogated, the case is in the Circuit Court, and he can take no further action of any sort in it.

In the Circuit Court, if the defendant is appellant, he may require the plaintiff to give security for costs If the plaintiff is appellant, his appeal bond is his security for costs, and he cannot require security of the defendant.

§ 3. The justice must file the papers in court five days before the next term; if the appeal is prayed within the five days, he must do so on the first day of the term.(*a*)

His failure to do so, however, will not defeat the right of the appellant to a trial of his cause, if the papers are filed at any time during that term.[7] The right, however, to a trial ceases with that term, for if the papers are brought in at a subsequent term, the appeal may be dismissed[8] If the papers are not filed during the first term, the appellee may produce them and have an affirmance of his judgment; and so, if the papers are filed, but the appellant fails when the case is called to prosecute his ap-

5 § 3857, M & V

6. Howard *v.* Long, 3 Lea, 209, 363 But see McCarver *v* Jenkins, 2 Heisk 629

(*a*) Shan. Code, § 4873

7. Humphrey *v* Humphrey, 1 Swan, 154.

8. Pierce *v.* Pierce, 4 Sneed, 79

peal, or when for any reason the appeal is dismissed, the appellee is entitled to an affirmance of his judgment.[9]

§ 4. Although the papers may be regularly filed in the court, yet the appeal may be dismissed on motion of the appellee for some other irregularity. Thus, if there was no appeal bond given, or if it is defective, or was given after the two days allowed for appealing, the appeal may be dismissed. But the appellant will be allowed to give a bond where none has been given, or give a good bond where the one given is defective or was taken after the two days elapsed. The Circuit Court may supply any defect in the proceedings of the justice the same as if they had been commenced in that court.[10] So, if the papers returned into court do not contain a statement by the justice that the appeal was prayed for and granted, the appeal will be dismissed But in this case also the defect may be cured by amendment in the Circuit Court, and if the fact be so, the justice will be permitted to come into court and make the proper entry thereof; and if the appeal bond by its recitals shows that an appeal was

9. §§ 3859, 3860, 3861, M & V, cannot be reconciled When does the appellee have the right to bring up the papers and have an affirmance of his judgment as provided in section 3859? Not certainly at the first term, for that would destroy the right given the appellant in section 3860 to prosecute his appeal if the papers are brought up at any time during that term, and would render the latter section meaningless The right then, if it exists, could only be exercised at a subsequent term And again, what is meant by the words "failing to appear and prosecute," in section 3860, and the words "failing to appear or defend within the first three days of the term" in section 3861? How is the appellant to appear and prosecute or defend? He has nothing to do until his case is called in its regular order, and it may not be called within the first three days of the term, or even during the term. The legislature, of course, meant something, and it is the province of the courts to find that out in this case, a thing not yet done Perhaps the meaning is that if the appellant fails to prosecute his appeal when the case is called for trial, the appellee, if he be defendant, may dismiss the suit, with costs, or if plaintiff, take his judgment of affirmance, with costs

10 § 3586, M & V, McCarver *v* Jenkins, 2 Heisk 633; Ing *v* Davey, 2 Lea, 280.

prayed and granted, this will be such presumptive evidence of the fact, unless rebutted, as to avoid the necessity of an amendment.[11]

§ 5. Although it be so that upon the dismissal of the appeal the appellee is entitled to an affirmance of his judgment below, yet it is not necessary that he should take this course. He has his election to ask for a *procedendo* to the justice directing him to execute the judgment; and it has been decided that where the appeal is simply dismissed with a judgment for costs only, the effect is to at once reinstate the justice's judgment, and it may be proceeded on as effectually as if a *procedendo* had been awarded.[12] This latter statement, however, is, of course, true only in those cases where the dismissal is upon some matter of irregularity not affecting the validity of the judgment below.

§ 6. Justice's proceedings, when brought by appeal into the Circuit Court, may there upon various grounds be quashed or abated; thus, when it appears that the justice has no jurisdiction of the subject-matter of litigation, the suit may be abated by plea in writing properly verified, unless the right to make such a defense has been waived on the trial before the justice, which would be the case if the defendant did not there rely upon it, but submitted to a trial on the merits.[13]

The jurisdiction of the justice depends both upon the nature of the litigation and the amount involved; and so, if in either the warrant shows the demand to be beyond the justice's jurisdiction, the proceedings may be dismissed. As, if it be a suit against an indorser, where demand and notice are not waived, on a note for one thou-

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11. § 3586, M & V; 2 Heisk 633, 2 Lea, 280; King *v* Booker, 1 Heisk 12

12 Anderson *v* Moore, 4 Baxt. 15.

13. Agricultural Assn *v* Madison, 9 Lea, 407; Crutchfield *v* Durando, 3 Lea, 69, Neville *v*. Northcut, 7 Coldw. 298

sand dollars; or, is an action on a note for a sum greater than one thousand dollars. The first would illustrate the want of jurisdiction because of the nature of the question involved, and the latter because of the amount involved. But causes of action and amounts are so inartificially stated in these proceedings, that the court would be cautious not to quash on account of apparent excess of jurisdiction, when it might be a case within the justice's jurisdiction.

If the process states a case within his jurisdiction, but the amount ascertained by the justice is for more, the plaintiff may remit the excess, and take his judgment for an amount of which the justice has jurisdiction [14] But if he takes a judgment for an amount beyond the jurisdiction, and an appeal is taken, the proceeding will be quashed. It will be taken in the Circuit Court that the judgment expounds the warrant correctly, and shows that it was brought for a larger amount than the justice had jurisdiction of, and he will not be allowed to remit enough in the Circuit Court to bring the case within his jurisdiction.[15] The Circuit Court may, however, render judgment for more than the maximum of the justice's jurisdiction, if the excess consists of interest accrued since the appeal.[16]

There may be a want of jurisdiction of the person of the defendant, as well as of the subject or amount. The justice, like any other court, acquires jurisdiction of the person by the service of process, or by the attachment of property, or by such other methods as the law prescribes. If the warrant is not returned served on the defendant, and yet judgment is rendered against him, he may appeal on that account within the two days allowed, and have the

14. § 4937, M & V
15. Dixon *v* Caruthers, 9 Yerg 30
16. Patterson *v* Sheffield, 7 Heisk 373.

judgment quashed. But the defendant may have waived the service of process by appearing before the justice and defending the suit on its merits, without excepting to the want of service. As in a court of record he would waive it by pleading in bar, so before a justice he waives it by defending on the merits. And his neglecting to except to the exercise of jurisdiction by the justice is considered as a waiver, and a putting the defense on the merits.[17] If the record of the justice shows such waiver, or the plaintiff proves it, it will be sufficient ground to overrule the motion to quash, or the plea in abatement.

§ 7. The relationship of the justice to one of the parties, his interest, his location in a particular district, and other matters affecting his competency, may be grounds of exception to his taking cognizance of the case, and if the exception was taken before him and overruled, the party will have the advantage of it on appeal. He cannot appeal, to be sure, until final judgment is rendered against him in the case, but he may appeal from that judgment, and on that appeal have the advantage of his exceptions to the jurisdiction. The exception, like many others, is waived by not being taken at the proper time.[18] Exceptions to a justice stand in this respect upon the same footing as exceptions to a juror. By the ancient common law, judges were liable to challenge upon the same grounds that jurors were.[19] And they are still incompetent by reason of kinship, interest, or connection with the case as counsel. A justice combines the character of both judge and juror.

§ 8. A justice before whom a case is returned for trial may join others with him in the investigation, but the

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17. Agee *v* Dement, 1 Humphr 332, Glass *v* Stoval, 10 Humphr. 455, Childress *v* Mayor, etc, 3 Sneed, 358

18. Wroe *v* Greer, 2 Swan, 172, Holmes *v* Eason, 8 Lea, 754

19 3 Bl Comm 361.

judgment must be rendered by him, the others having no legal jurisdiction, and their decision no validity.[20]

§ 9. Quashing and abating the proceeding is the same thing. There are various irregularities for which justices' proceedings may be abated or quashed. But every intendment is to be in favor of their validity and sufficiency, and no civil case originating before them is to be dismissed when carried to a higher court, "for any informality whatever, but it shall be tried upon its merits; and the court shall allow all amendments in the form of action, the parties thereto, or the statement of the cause of action, necessary to reach the merits, upon such terms as may be just and proper."[21]

§ 10. There are no pleadings before justices, except the plea in abatement, usury, and *non est factum*. These defenses are to be pleaded in writing and sworn to, but they need not be formal.[22] And when the case comes into the Circuit Court, it stands in the same situation as it did before the justice. No pleadings are necessary, with the exception of pleas in abatement and *non est factum*. All defenses that might be pleaded if the case originated in the Circuit Court, may be introduced in evidence. The trial is conducted in the same way as in cases originating in court. The only paper read to the jury is the warrant, except where there may be written pleas. The judgment is not read, it being annulled by the appeal. The plaintiff has his case to prove as if there never had been a trial of it; and he may introduce such new evidence as he chooses. The defendant may also introduce any new defense. There is no pleading, as there is in court cases, to limit him to any particular defense; and if there was,

20. Crouch *v.* Martin, 4 Sneed, 570.
21. §§ 4951, 4952, M. & V.
22. Baker *v.* Allen, 2 Tenn. 175, Wood *v.* Hancock, 4 Humphr. 465, 14 Lea, 433.

he might, by leave of the court, introduce a new defense by a supplemental plea.

No regard is to be paid by the jury to the judgment of the justice, in finding their verdict. They are to regard it as a new case, to be tried by them upon the same principles that should have governed the justice. It is to be tried upon principles of equity where the amount is not over fifty dollars, instead of rigid legal principles.[23] But there are some cases in which the law will not tolerate any difference between equity and rigid law, among which may be mentioned the law of negotiable paper and the statute of limitations It is rare indeed that there is any difference between the law and the equity of a case.

If the jury find a larger amount for the plaintiff than the justice has jurisdiction of, the plaintiff must remit the excess, or judgment will be arrested. So if the defendant introduces a set-off, and there is found due him, after paying the plaintiff's demand, a balance beyond the justice's jurisdiction, he cannot have judgment for it He may remit the excess, and take judgment for the balance, but he cannot afterward sue for the amount remitted[24] It is to be kept in mind that the suit originated before a justice of the peace, and, although it is now in court, it is to be treated as if it were before the justice, and the amount of his jurisdiction cannot be transcended by the verdict and judgment.

Although the debt offered in set-off may be larger than a justice has jurisdiction of, yet if the balance, after satisfying his debt, is not beyond the jurisdiction of the justice, the defendant may recover it against the plaintiff[25]

§ 11. When the defendant has recovered a judgment against the plaintiff before the justice, on a set-off, and

23 § 4899, M & V
24 § 4937, M & V
25 McClain v Kincaid, 5 Yerg 233

the plaintiff has appealed, he cannot dismiss his appeal or his suit so as to avoid the set-off, but the defendant is entitled to have his judgment affirmed against the plaintiff for the set-off.[26]

§ 12. An appeal in the nature of a writ of error, as well as a writ of error, lies from the judgment of the Circuit to the Supreme Court, in these appeals from justices, in every case where either party is dissatisfied with the judgment, precisely as it does in those cases which originated in the Circuit Court. Motions for new trial and in arrest of judgment, bills of exception, appeal bonds, and, in fine, all the incidents that pertain to trials and appeals in cases commenced in the Circuit Court, equally pertain to these cases. And they take the same course in the Supreme Court as those cases.

§ 13. The following forms appropriate to the matters discussed in the preceding part of this chapter are submitted for the benefit of the student and the convenience of the practitioner.

1. Papers not Filed — Appellee Produces them, and Moves an Affirmance of the Judgment.

James Hart }
v } APPEAL FROM J. P.
John Den }

The plaintiff produced the papers in this case, showing that on the 1st day of February, 1887, he had obtained a judgment against the defendant before John Roy, a justice of the peace of Wilson county, for two hundred dollars besides costs, from which judgment the defendant appealed to the last term of this court, and gave bond, with A. B security, for the effective prosecution of said appeal, and the papers not having been filed during said term, on motion of the plaintiff, it is considered by the court that said judgment be affirmed, and that the plaintiff recover of the defendant and the said A. B, his security in the appeal bond, the aforesaid sum and dollars, being interest thereon, and also the costs below and of the appeal

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26 Riley v. Carter, 3 Humphr 230, § 3678, M & V.

2. Plaintiff Appellant Fails to Appear during the Term and Prosecute His Appeal.

James Hart
v
John Den. } APPEAL FROM J. P

Came the defendant, and the plaintiff, being solemnly called to come into court and prosecute his appeal, came not, but made default It is therefore considered by the court that this suit be dismissed, and that defendant recover of the plaintiff and A. B, his security for the prosecution of the appeal, the costs of this suit

3. Defendant Appellant Failing to Appear.

Came the plaintiff and the defendant, being called to come and prosecute his appeal, failed to do so It is therefore adjudged that the judgment of John Roy, justice of the peace, be affirmed, and that the plaintiff recover of the defendant and A B, his security in the appeal bond, one hundred dollars, the amount of said judgment, and dollars, being interest thereon from the day of , the date of its rendition, and also the costs.

4. Quashing the Proceedings of the Justice.

Came the parties, and on motion of the defendant, and it appearing to the court that the justice of the peace had no jurisdiction of this case (or, that no cause of action is stated in the warrant, or whatever else may be the ground of the motion), it is therefore adjudged that his proceedings be quashed, and that the defendant go hence and recover of the plaintiff the costs

5. Dismissing the Appeal.

Came the parties, and on motion of the plaintiff (or defendant, if he is appellee), and it appearing that no appeal bond was given by the defendant (or, that no appeal was granted, or, whatever other fact may be the ground of the motion), it is therefore considered by the court that the appeal be dismissed, and that the plaintiff recover of the defendant the costs

It was formerly held that where a cause was not lawfully removed from an inferior to a superior jurisdiction, the course was to strike it from the docket, and direct a *procedendo* to the inferior tribunal, giving no judgment for costs, because the court, having no jurisdiction, could give no judgment (*a*) But now "where a suit is dismissed from any court for want of jurisdiction, or be-

(*a*) 4 Yerg 298, 1 Tenn 222

cause it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause.(*b*)

6. Form of an Entry where there has been a Trial and a Verdict for the Amount of the Judgment.

Came the parties and a jury of good and lawful men, to wit: A, B, C, etc (naming all of the jurors), who being elected, tried, and sworn the truth to speak upon the matters in controversy, upon their oath do say, that the judgment of the justice of the peace in favor of the plaintiff against the defendant for two hundred dollars, was correct (or, they find that the defendant was indebted to the plaintiff at the time of the rendition of the judgment of the justice of the peace, two hundred and fifty dollars, and ought to have had judgment for that amount), and that the plaintiff has sustained twenty dollars damages by reason of the appeal, being interest on said sum It is therefore considered by the court, that the plaintiff recover of the defendant the aforesaid sum of two hundred dollars, and twenty dollars damages, and the costs

7. Judgment of Affirmance on Appeal in Error to the Supreme Court.

Came the parties, and upon argument and due consideration, the court is of opinion that there is no error in the judgment of the Circuit Court It is therefore considered by the court that the said judgment be affirmed, and the defendant in error recover of the plaintiff in error, and A B, his surety in the appeal bond, two hundred and twenty dollars, the amount of the judgment of the Circuit Court, and the further sum of forty dollars, being interest thereon, and also the costs of this appeal, as well as the costs below.

8. Judgment of Reversal in the Supreme Court.

Came the parties, and upon argument and due consideration, the court is of opinion that there is error in the judgment of the Circuit Court Therefore it is adjudged that said judgment be reversed, and that the plaintiff in error have a new trial (or that judgment be arrested, or that the proceedings of the justice of the peace be quashed, or whatever other specific thing the court adjudges), and recover of the defendant in error the costs of this appeal in error.

§ 14. It should be remarked that upon a simple appeal the parties stand in the same relation as plaintiff and

(*b*) § 3940, M & V, Jackson *v* Baxter, 5 Lea, 344

defendant in the appellate court, that they did in the inferior tribunal. But upon a writ of error, or an appeal in the nature of a writ of error, the appellant is plaintiff, and the appellee defendant in error, whatever may have been their relation in this respect in the court below.

§ 15. Upon a reversal of the judgment of an inferior court, the appellate court is to give such judgment as the inferior court should have given. The Supreme Court, therefore, always, on reversing the judgment of the Circuit Court, renders such judgment as that court should have given, whether the case was originally instituted in that court, or came into it by appeal from an inferior tribunal, except where the damages to be assessed are uncertain, and then the cause is remanded to the lower court for further proceedings.(c)

CERTIORARI IN LIEU OF APPEAL.

§ 16. The second mode of removing cases from justices' courts into the Circuit Court, that is, by *certiorari,* in lieu of an appeal, is now to be considered.

A party cannot, as a matter of choice, resort either to the appeal or *certiorari,* to be relieved from the judgment of a justice of the peace. Within the first two days after the rendition of the judgment, the appeal is his only remedy. If he lets that time elapse without appealing, the *certiorari* is his only remedy. But he is not entitled to that as a matter of course. He has to give no reason for appealing; it is sufficient that he chooses to appeal. It is not so with the *certiorari.* He has to give good reasons for that before he can obtain it He has to show, in the first place, why he did not appeal.

The appeal is the ordinary remedy allowed by the law for the grievance he complains of; two days were given

(c) § 3886, M & V.

him to avail himself of it; and he must now show a good reason for letting them slip. He must show that it was not on account of any fault or negligence of his [27]

§ 17. The particular facts that would sustain this proposition cannot, of course, be enumerated, but they have been classified by the decisions of Tennessee, so that the facts of any particular case will likely fall within one of those named It has been decided that the failure to appeal is sufficiently accounted for if it appear that the right to do so was defeated· First, by the oppressive or erroneous act of the court or justice. Second, by the willful or negligent act of the clerk. Third, by the contrivance or procurement of the adverse party. Fourth, by inevitable accident; or, Fifth, by the blameless misfortune of the party injured.[28]

It would not be safe to assert that no case could arise which would entitle the party to a *certiorari* unless it were embraced in one of these classes By the Constitution of Tennessee [29] the judges have power to grant the *certiorari* in all civil cases, on sufficient cause, supported by oath or affirmation What is "sufficient cause" must be defined by the statute law or judicial decisions; and the *principle* established by the latter is, that when the law gives an appeal and the party is deprived of it without any fault or negligence on his part, that is "sufficient cause," if he shows, in addition to it, a meritorious case

Since the great extension of the jurisdiction of justices in Tennessee, and the increased importance of having the cases litigated before them reinvestigated in a court which better understands the law, the rule which requires the statement of a good reason for not appealing,

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27. McMurry *v.* Milan, 2 Swan, 176; Hardin *v.* Williams, 5 Heisk 389, Copeland *v* Cox, 5 Heisk 171

28 McMurry *v* Milan, 2 Swan, 176, Hardin *v* Williams, 5 Heisk 389, Copeland *v* Cox, 5 Heisk 171

29 Art 6, § 10

will not be applied with so much stringency where a clear case of merits is presented.[30]

§ 18. As a practical illustration of the several grounds stated above as excuses for not appealing, it has been held a sufficient excuse for not doing so

1. Where judgment was given against the plaintiff, and he would have appealed, but the justice told him it was unnecessary, as he could bring a new suit in which he could have the benefit of some newly-discovered evidence. In this advice he was deceived by the justice, the law being that a man cannot bring a new suit for the same cause after a judgment against him on the merits, whether the judgment is rendered by a justice of the peace or a court of record.[31]

2. Where the petitioner had employed a justice to attend to the case for him before another justice, and after judgment rendered against him, he proposed to appeal, the justice whose services he had engaged told him it was unnecessary, because the case would be decided in the same way in the Circuit Court. He, being old, blind, and ignorant, desisted from appealing on this advice. Afterward he discovered that this justice had sat with the other, and concurred with him in rendering the judgment.[32]

3. Where the appellant offered to give the necessary appeal bond on Saturday, the second day after the judgment, but the justice being on his way to preaching, agreed to take it at his office on Monday. On Monday he refused to take it, on the ground that the time had elapsed.[33]

4 Where the warrant was returnable before the justice on a certain day The defendant attended until late

30 McCormack *v* Murfree, 2 Sneed, 46; Evans *v* Evans, 4 Coldw. 604, Hardin *v* Williams, *supra*

31. Chappel *v* Jones, 8 Humphr 108

32. Allen *v* Prim, 2 Swan, 337

33. Smith *v* White, 5 Humphr 46

in the evening, and went home. The warrant was returned and the justice rendered judgment after sundown, of which the defendant knew nothing until the time for appealing had elapsed.[34]

5. Where the petitioner was unable to give the necessary security within the time allowed for appealing.[35] In this case it is decided that he is not bound to state in his petition what degree of diligence he has used to give the security, nor why it is that he was unable to give it, whether on account of his poverty, or other cause It is furthermore said that although he might safely have taken the pauper oath, and thus obtained an appeal without security, yet he was not bound to do it until he fully ascertained that he could not give security, and if the time for appealing elapsed before he did ascertain it, he might still resort to the *certiorari*.

In a subsequent case[36] a similar reason for not appealing was decided to be insufficient But it differed from Hale *v* Landrum in this — that the petitioner merely stated that he was unable to give security at the time the judgment was rendered, and the court remarked: "If the petitioner was not prepared with security the day the judgment was rendered, he might, for aught that appears, have given it afterward," that is, within the two days allowed for appealing From this reasoning of the court, we infer that it appeared in Hale *v*. Landrum, that the inability to give security continued until the two days allowed for appealing had expired, though that fact does not appear in the report of the case

6 Where an appeal was taken, and dismissed on account of the attorney of the petitioner neglecting to perform a duty required by law.[37] The doubtful question,

34 Angelly *v* Donoho, 3 Humphr 145
35 Hale *v* Landrum, 2 Humphr 32, Day *v*. Johnson, 4 Coldw. 232
36 Adair *v* Davis 3 Humphr 137
37 Garrett *v* Perrymann, 2 Tenn 108.

whether the negligence of an attorney in taking or conducting an appeal will be good ground for a *certiorari*, is in this old case decided in the affirmative. But we do not suppose it would be so in every case of omission of duty by an attorney, whereby his client might lose the benefit of his appeal.

7. Where notes were put in the hands of an agent, a constable, to collect, to which no defense was known or apprehended, and soon afterward the payee became sick While he was sick the agent brought suit before a justice, who gave judgment against the plaintiff, who was not informed of it until he recovered, when it was too late to appeal. This was held to be ground for a *certiorari* It was held not to be necessary for the plaintiff to have an agent present authorized to appeal in the event of judgment against him, inasmuch as no defense was anticipated [38]

But the mere absence of a party, whether plaintiff or defendant, without some better reason than that he knew of no defense to the demand on which he sues or is sued, will not be a good excuse for not appealing. Thus, where the reason of his nonattendance at the trial was, that he was sued on a note as security for his son-in-law, and knowing that he had signed several notes for him, and supposing this to be one of them, he deemed it unnecessary to attend He afterward discovered, too late to appeal, that his name had been forged to this note. It was determined that he ought to have attended the trial and made his defense, and as he failed to do so, he had no sufficient cause for a *certiorari* [39]

These cases are sufficiently illustrative of this subject.

§ 19. In the second place, the party seeking the unusual remedy by *certiorari* as a substitute for the appeal

38. McCormack v Murfree *supra*. This case establishes a more liberal rule than that declared in 3 Humphr 148, and 5 Yerg 108

39. McMurry v Milan, *supra*

must show merits, that is, that the judgment complained of is unjust. The object of the *certiorari* is to obtain a new trial in the Circuit Court, and it would be useless to grant it unless the party shows that a judgment in his favor would be, or ought to be, the result of it. If no injustice has been done him in the judgment, the controversy ought to stop, however improperly he may have been deprived of his appeal. It is the policy of the law to have an end of litigation as soon as substantial justice is done to the parties, without regard to incidental errors in the forms of proceeding, and so the petitioner must show that the judgment against him is unjust. We have no judicial decisions as to the manner in which this should be stated; but, from the analogies of the law, we would suppose that a mere general statement that it was unjust would not be sufficient. There would have to be a statement of the facts which would show its injustice to the court. If, for instance, the judgment was on a note, the petitioner would have to show that he never executed it, or had paid it, or whatever other matter constituted his defense. So, if it were on an account, that he had never bought the goods, requested or promised to pay for the work, borrowed the money, or that he had paid off the account; and so in regard to other defenses. But in the statement of these facts, only reasonable certainty is required. A defense *prima facie* good is all that is necessary. No supposable answer to it need be anticipated and denied.[40]

§ 20. As the applicant for a *certiorari* must show that he lost the benefit of an appeal without his fault or neglect, so he must show that he is guilty of no fault or negligence in endeavoring to supply the loss by obtaining a *certiorari*. It will only be granted "where reasonable and proper diligence is used to procure it. The question

40. Dick *v* Powell, 2 Swan, 632. On the subject of merits generally, see authorities cited above.

of diligence is one always dependent on the facts and circumstances stated in the petition. It is diligence to bring up the proceedings to the first term of the Superior Court held after judgment; and, *prima facie,* it is culpable neglect and delay not to do so until the second or any subsequent term. It is true, the *certiorari* may well be granted at the second or subsequent term, but only on cogent and sufficient reasons, accounting for the delay to the satisfaction of a sound legal discretion. There must be no *laches* justly attributable to the party;" if there is, the *certiorari* must be refused.[41]

The principle is that there ought to be as little delay as possible in applying for the remedy; it is a substitute for the appeal, and ought to bring up the proceedings to the same term to which the appeal would have brought them, if it had not been defeated.[42]

But the same causes that would be deemed sufficient for not appealing would be deemed sufficient for not applying at an earlier period for the *certiorari,* if that cause continued to operate.

§ 21. The only mode of obtaining a *certiorari* is by written petition. And the points to be observed in the petition are its address, its statements, and its prayer

1 *Its address.* It should be addressed to the officer who has a right to grant it, and of whom it is sought.[43] It may be granted at any time within twenty days after the rendition of the judgment by any circuit judge of the State, or by any two justices of the county.[44] After the lapse of twenty days, it can only be granted by a circuit judge, even if the party was ignorant of the existence of the judgment till the twenty days had expired.

2 *Its statements* It should state: 1 A good reason

41 Johnson *v.* Deberry, 10 Humphr. 439

42. Trigg *v.* Boyce, 4 Hayw 100, Newman *v.* Rogers, 9 Humphr. 120

43. Duggin *v.* McKinney, 7 Yerg 21.

44. § 3843, M. & V.

for not appealing. 2. Merits, or, in other words, facts which show that the judgment against him is unjust. If it is only unjust in part, it must show to what amount, and the *certiorari* is only to issue for that amount, leaving the judgment in full force, to be carried into execution as to the balance.[45] 3. If the application is not made at or before the first term of the Circuit Court after the rendition of the judgment, a good reason for the delay must be given. 4. It must be stated that it is the first application for the writ.[46]

3. *Its prayer.* It should pray that writs of *certiorari* and *supersedeas* issue — the first to bring the proceedings of the justice into the Circuit Court for the purpose of having a new trial; the second to stop the running of any execution on the judgment. If the judgment is against two defendants, one alone may obtain a *certiorari*, leaving the judgment in full force against the other *certiorari*.[47]

A form of the petition, to which is attached the affidavit of the party and the fiat of the judge is here given for the benefit of the young lawyer, who may need it as a guide in his practice:

Form of Petition.

To the Hon W H Williamson, Judge of the Seventh Judicial Circuit, presiding at Lebanon, in Wilson county:

Your petitioner, John Ross, respectfully represents to your honor, that on the 2d day of January, 1887, a judgment was rendered against him by James Peace, a justice of the peace of Wilson county, for four hundred dollars, in favor of David Dodge, on a note executed by your petitioner to said Dodge on the 1st day of July, 1887, and payable on the 25th December last Your petitioner would have appealed from said judgment, but for the fact that on the morning of the day when it was rendered he was taken violently sick, so that he was unable to attend the trial or to think about business, and he continued in that condition for a week.

The judgment is wholly unjust The note was paid on the 29th of December, by the delivery of two mules to the plaintiff, which

45 § 3845, M & V; O'Sullivan *v* Larry, 2 Head, 56
46. § 3844, M & V. See McGhee *v* Grady, 12 Lea, 89.
47. § 3846, M & V

he accepted in payment, and promised to deliver the note next day, but instead of that, he offered to return the mules upon the pretense that they were unsound, which was untrue

Your petitioner prays for a writ of *certiorari* to bring the case into the Circuit Court of Wilson county, to be retried He also prays for a *supersedeas* to stay all further proceedings on said judgment

This is the first application which your petitioner has made in this case for writs of *certiorari* and *supersedeas*

H CRABB,
Attorney.

STATE OF TENNESSEE — .. COUNTY.

John Ross made oath before me, W H Williamson, judge, etc, that the statements made by him in the foregoing petition are true, to the best of his knowledge and belief, and hereto subscribe his name in my presence, this 10th day of January, 1887 JOHN ROSS

W. H. WILLIAMSON,
Judge, etc.

Fiat.

To the Clerk of the Circuit Court of Wilson County

Issue writs of *certiorari* and *supersedeas*, as prayed in the foregoing petition, on the petitioner giving bond and security according to law

January 10, 188 W H. WILLIAMSON,
Judge, etc

The petition may be sworn to before any judge, justice of the peace, or the clerk of the Circuit Court [48] If there are several petitioners, any one of them may make the affidavit. It may also be made by an agent of the petitioner.[49]

On presenting the petition to the judge, he swears the petitioner to it himself, unless the affidavit appears to it, sworn to before a justice of the peace or clerk, which is usually the case where the petitioner does not present it in person. If the judge grants it, he writes his fiat on it as above, or he may make it more special in its directions to the clerk, where the case requires it.

The judge then envelops and seals it up, to secure it from alteration, and directs it to the clerk of the court

48. § 3844, M & V

49 Dwiggins *v* Robertson, 1 Tenn 81, Foster *v* Blount, 1 Tenn 343.

§ 22. The clerk before issuing the writ is to take bond and security from the petitioner in double the amount of the judgment, or the error complained of, payable to the opposite party, conditioned to prosecute the writ with effect, or perform the judgment to be rendered in the cause.[50] The bond may be in the following form:

We, John Ross and James Ross, acknowledge ourselves indebted to David Dodge, in the sum of eight hundred dollars, to be void if the said John Ross shall prosecute with effect a *certiorari* prayed by him to the next term of the Circuit Court of Wilson county, from a judgment for four hundred dollars and costs, rendered against him by James Peace, a justice of the peace of said county, on the 2d day of January, 1887, in favor of the said David Dodge, or shall perform the judgment that may be rendered by the Circuit Court in the premises

Witness our hand, this 11th January, 1886.

JOHN ROSS,
JAMES ROSS

The *certiorari* may also issue on taking the pauper oath, as follows:

I, John Ross, do solemnly swear that, owing to my poverty, I am unable to bear the expenses of a *certiorari* which I am about to prosecute, from a judgment for four hundred dollars, rendered against me on the 2d January, 1887, by James Peace, a justice of Wilson county, in favor of David Dodge, and that I believe said judgment to be unjust. JOHN ROSS.

Sworn and subscribed before me, this 11th January, 1887

S G STRATTON,
Clerk

§ 23. A *supersedeas* may also be issued on the pauper oath, but not unless the judge so especially directs in his fiat. And he cannot make such order unless notice is first given to the adverse party of the application, so that he may appear and resist it.[51] Without such order the peti-

50. § 3847, M & V

51 § 3849, M & V. This provision of the Tennessee Code is directory only as to the notice, and the *supersedeas* issued without notice is not void, but is voidable, and the petition is subject to be dismissed Combs v Vogeli, 7 Baxt 271, Legate v Ward, 5 Coldw 451 But an officer who surrenders property under such voidable process will be protected McKamy v Lawson, 3 Head, 357 *A fortiori* if the writ is valid Fry v Manlove, 1 Baxt 257

tioner might prosecute his *certiorari* without security, but in the meantime execution might run against him on the judgment, and the money be made out of his property; but should he succeed in reversing the judgment, the money would have to be restored.

The reason why a *supersedeas* is not issued of course on the pauper oath is that it would release property that might have been levied on from the custody of the officer, and restore it to the defendant without any security for its forthcoming, if he should fail in his *certiorari*. It has been a disputed question whether this would be the effect, or whether the sheriff would not retain the possession, but this law assumes, and it has been decided, that the property would be released from the levy[52] And, further, if no execution had issued before *supersedeas*, none could issue; if one had issued, but was not levied, it could not be levied. Unless a strong case of merits and a manifest case of poverty is made out, the plaintiff ought not to be exposed to this danger of losing his debt, and hence he ought to have notice to be present to contest these points before the order is made The judge is authorized, on refusing the order for a *supersedeas* on the pauper oath, to make such other order in relation to property levied on as may seem right and safe to both parties under the circumstances, as, that the officer shall keep the property, and the plaintiff to give bond to the defendant for damages, or that he shall give bond for the safe-keeping of the property himself till the decision of the *certiorari*.[53]

§ 24. The bond being given, or the pauper oath taken, the clerk issues the *certiorari*, which is in the following form:

THE STATE OF TENNESSEE

To James Peace, Justice of the Peace for Wilson County:

In the suit of David Dodge against John Ross, wherein judgment was rendered by you in favor of the plaintiff, on the 2d day of January, 1887, for four hundred dollars and costs, send all the

52 McKamy v Lawson, *supra* 53. § 3850, M & V

papers, inclosed and certified under your hand and seal, to the Circuit Court of Wilson county, to be held at the courthouse in Lebanon, on the second Monday in January, 1887, to the end that such other proceedings may be had thereon as to the court may seem right And have you then and there this writ, showing how you have obeyed the same

Witness, S G Stratton, clerk of said court, this second Monday in September, 1887 S G. STRATTON,
Clerk.

§ 25. An analysis of this writ presents to our view the following parts:

1. *The style,* "The State of Tennessee," which is the same as all other writs

2. *The address* which is to the justice who rendered the judgment, like the mandamus and *habeas corpus.* If he has vacated his office, and his papers have passed into the hands of a successor, the writ should be directed to the latter.

3. *The description of the judgment,* by reciting the following facts: 1. The names of the parties. 2. What justice rendered it 3. In whose favor. 4. On what day. 5. For what amount. This is sufficient description.

4 *The command* "Send all the papers inclosed and certified under your hand and seal." The justice may either transmit the papers in this way, or he may bring them himself and file them with the clerk, which is the more usual way. It is from this command to *certify* the papers to the Superior Court that the writ takes its name

The justice transmits the original papers, except in two cases: 1. Where the *certiorari* extends only to part of the judgment, the balance not being complained of in the petition. 2. Where the *certiorari* is brought by one or more of several parties In these cases he sends up a copy of the papers, keeping the original, to be proceeded on for the amount not complained of, or against the party not complaining [54]

54. §§ 3845, 3846, M & V

5. *The court to which the papers are to be certified:* "To the Circuit Court." The Code of Tennessee provides that "all writs of *certiorari* and *supersedeas* granted to revise the proceedings of the County Court or of any justice of the peace shall be made returnable to the Circuit Court, unless otherwise expressly provided by law.[55]

6 *The venue or county in which the certiorari is to be prosecuted:* "Of Wilson county." A new trial is what is sought by the *certiorari,* and the venue of the new trial is fixed by the venue of the original trial The bringing of the action in Wilson county fixes the venue there.

7. *The term of the court* "On the second Monday in January, 1887." It is to be the next term after the issuance of the writ. It is a substitute for the appeal, and that we have seen is to be to the next term after it is taken.

8. *The design of the writ* "To the end that such further proceedings may be had thereon as to the court may seem right" What those proceedings will be will depend upon the law of practice in such cases.

9. *The command to return the writ at the designated time*

10 *The teste,* as in other writs

Thus complete, and issued by the clerk, the plaintiff or his attorney takes it and delivers it to the sheriff, who serves it on the justice by delivering it to him.

§ 26. It is the duty of the clerk also to issue a writ of *supersedeas* in all necessary cases, directed to the opposite party, or the officer in whose hands the execution may be, which shall effectually supersede all further proceedings thereon[56] It is necessary in all cases where there is a judgment on which an execution may issue, or has actually issued In the former case, it is directed to the opposite party, commanding him to desist from any further proceeding; that is, not to take out an execution. In the latter case, it is directed to the officer who has it in his

55 § 3841, M & V. 56 § 3848, M & V

hands, commanding him to proceed no further with it than he has already proceeded. It may be in the following form:

THE STATE OF TENNESSEE.

To John Hearn, a Constable of Wilson County.

In the suit of David Dodge against John Ross, wherein James Peace, a justice of the peace of Wilson county, rendered judgment in favor of the plaintiff, on the 2d day of January, 1887, for four hundred dollars and costs, you are hereby commanded to desist from proceeding further in the execution of the judgment, and to notify the plaintiff that the record in said suit is removed into the Circuit Court of Wilson county, by writ of *certiorari*, returnable on the second Monday in January, 1887 And have you then and there this writ, showing how you have obeyed the same

Witness, S G Stratton, clerk of said court, this second Monday in September, 1887 S G STRATTON,
Clerk

This is delivered by the sheriff to the constable, who returns the execution to the justice "superseded," and gives notice as commanded to the plaintiff.

§ 27. If the justice fails to return the *certiorari* or the papers, the petitioner may, upon affidavit of its service, have an order made on him to compel him to return it, or he may have an *alias certiorari*

If it is returned, and the plaintiff has had notice as directed by the *supersedeas*, or if he appears voluntarily, he may move to dismiss the *certiorari*. The grounds of this motion are:

1. That it does not show sufficient cause for not appealing.

2. That it does not show merits, or facts which evince the injustice of the judgment

3. If one or more terms of the Circuit Court have intervened between the date of the judgment and the application for the writ, that the delay is not accounted for in the petition

4 That the petition does not state that it is the first application for the writ.

5. That the papers returned by the justice contradict the petition in some of its essential statements.[57] But the fact that the papers do not confirm the allegations of the petition will not be sufficient to dismiss it Thus, where the petitioner stated that he had appealed, and the justice's papers did not show any appeal, it was held that this was no contradiction, as he might have appealed, and the justice might have failed to enter it.[58]

Formerly, on a motion to dismiss, the petition was taken as true, except so far as it is contradicted by the justice's papers, and could not be contradicted and dismissed by extraneous evidence, as by counter-affidavits, either of the adverse party or of disinterested witnesses.[59] But now in Tennessee, on the trial of the motion to dismiss, the facts set forth in the petition as grounds for not appealing may be called in question, and the court may hear proof and determine the truth of the matter (*a*)

The motion to dismiss must be made at the return of the writ, or at the first term after the adverse party has that notice of it which the *supersedeas* commands the constable to give him. The rule is that he must move to dismiss it at the earliest opportunity presented [60] If the motion is not then made, the cause stands for trial on its merits; the *certiorari* has performed its office, which was merely to remove the case into court for a new trial, and henceforth no further attention is to be given it.

For want of the bond required, the *certiorari* may doubtless be dismissed at any time, unless the omission or defect be supplied by the giving of a new bond The adverse party has at all times a right to have his judgment below and the costs secure If it was the plaintiff

57 Eddie *v* Cowan, 1 Sneed, 290
58 Spivey *v.* Latham, 8 Humphr 703
59. Nicks *v* Johnson, 3 Sneed, 326, Studdurt *v* Fowlkes, 2 Swan, 537
(*a*) See Acts Tenn Approved March 11, 1903
60 Chappel *v* Jones, 8 Humphr 107, 3 Sneed, 326

below, the petitioner has a right to demand of him security for the costs.[61] But, lest the parties might be surprised by such motions in the absence of their friends, time will be allowed them, if necessary, to give the required security.

§ 28. The petition may be amended in the Circuit Court. But the court will allow it with great caution and jealousy; it must be clear that it is demanded by the truth and justice of the case.[62] The amendment is in the form of a supplemental petition, and must be sworn to and offered to the court as an amendment. It may be in the following form:

To the Hon W. H. Williamson, Judge, etc.

John Ross respectfully states, by way of supplement to his original petition for a *certiorari* in the case of David Dodge against himself, that (here state the new facts) JOHN ROSS

Sworn to and subscribed in open court, 20th January, 1887.

S G STRATTON,
Clerk.

The amendment may be offered before the motion to dismiss, or afterward, and even after the court has pronounced its judgment that the writ be dismissed. That judgment is under the control of the court during the term, and may be set aside and the amendment received if the justice of the case requires it. The court may allow material amendments at any stage of the proceedings.[63]

Amendments are allowed in all the other proceedings upon a *certiorari* to the same extent as upon an appeal, or in any other form of proceeding in a civil action. But an amendment may so change the character of the case as to release the sureties in the *certiorari* bond. Such

61. § 3855, M & V.
62. Steel *v.* West, 7 Humphr. 109; Hollins *v.* Johnson, 3 Head, 349.
63. § 3578, M. & V.

was the case where the plaintiff amended the warrant by substituting the name of another person as plaintiff.[64]

§ 29. If no motion to dismiss the *certiorari* is made at the return term thereof, the case stands for trial at that term, however insufficient the petition may be, either in the statement of merits, or the reason for not appealing. If a motion to dismiss is made and overruled, the case likewise stands for trial at that term.[65]

It is to be tried precisely as if it were an appeal, the *certiorari* being employed merely to effect what the appeal would have effected had it not been defeated. The plaintiff before the justice is the plaintiff in the Circuit Court The judgment of the justice is of no effect, but the plaintiff has to prove his right to recover, as if there never had been a trial of the case before. The defendant is not confined to the defenses relied on in his petition; that has performed its office when it has obtained a new trial and is *functus officio*. Whatever available defense the defendant may have, he may introduce on the trial as he might upon a new trial or appeal.[66]

§ 30. The judgment against the petitioner may be, on the dismissal of his *certiorari* for some cause or other or upon the verdict of a jury against him on the merits of the case, either for the same or a larger amount than the judgment below In either case judgment is to be rendered against him and his sureties in the *certiorari* bond for the amount recovered in the Circuit Court, with interest at the rate of six per cent. per annum from the date of the judgment of the magistrate, "and all costs" The amount recovered in the Circuit Court will be the same as was recovered before the magistrate in all the cases except one, and that is where the jury find a larger amount due at the date of his judgment.[67]

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64 Phillips *v* Wells, 2 Sneed, 154, Smith *v* Roby, 6 Heisk 548 But see Elder *v* Fielder, 2 Tenn Leg Rep 84

65 See Acts Tennessee Approved March 11, 1903

66. Clark *v* Howard, 10 Yerg. 250 67. §§ 3853, 3854, M & V

If the judgment of the magistrate is void, as, if it is for a greater amount than he has jurisdiction of, the Circuit Court will quash his proceedings, as would have been done if the defendant had appealed. If the *certiorari* is improperly granted in that case, it will be dismissed, but on its dismissal the court will not affirm the judgment of the justice, for, being void, it cannot be affirmed. Judgment can only be rendered against the petitioner and his sureties for the costs of the *certiorari*.[68]

A writ of error, or an appeal in the nature of a writ of error, lies to the Supreme Court from the final decision of the Circuit Court in these *certiorari* cases, as well as others; and it is granted on the same terms and conducted in the same way.

§ 31. The following forms illustrate the entries on the minutes — first, in dismissing the petition for *certiorari*, and, second, in rendering judgment on the verdict of the jury where there has been a trial on the merits:

Form of Judgment on Dismissal.

David Dodge
v
John Ross
} *Certiorari.*

Came the parties, and the plaintiff moved to dismiss the defendant's *certiorari* on account of the insufficiency of the petition, and it appearing to the court that the petition is insufficient, it is considered by the court that the *certiorari* be dismissed, and that the plaintiff recover of the defendant and James Ross, his security for the prosecution of the same, four hundred dollars, the amount of the judgment of the justice of the peace, and dollars, being interest thereon from the 2d day of January, 1887, and also the costs

Form of Judgment on Verdict.

David Dodge
v
John Ross
} *Certiorari*

Came the parties and a jury of good and lawful men, to wit, A, B, C, etc., who, being elected, tried, and sworn the truth to speak on the matters in controversy, upon their oath do say, they find that the judgment of the justice of the peace in favor of the plaintiff for

68. Dixon v. Caruthers, 9 Yerg 30.

four hundred dollars was correct. It is therefore considered by the court that the plaintiff recover of the defendant and James Ross, his security for the prosecution of the *certiorari*, said sum of four hundred dollars, and the further sum of dollars, being interest thereon from the 2d day of January, 1887, the date of the judgment, and also the costs

§ 32. There is another use to which the *certiorari* and *supersedeas* is applied, to which it is proper to advert before concluding this chapter Courts of record usually possess the power of correcting abuses in final process awarded by them. It will be seen in the chapter on Summary Remedies that both the Circuit and Supreme Courts of Tennessee exercise power in all such proper cases. This power does not belong to justices of the peace. Their jurisdiction is limited to the rendition of the judgment, the granting of an appeal, the stay and issuance of the execution, and the issuing of writs of *scire facias* where proper. The theory of their jurisdiction is that it extends only to the limits defined by statute law, and that the giving to them jurisdiction of a subject does not carry with it all those general powers of making that jurisdiction effectual, or of preventing its working injustice, which belongs to courts of general jurisdiction When a justice renders judgment in a case and adjourns, his court is at an end, and he has no further power over it except what the statutes give him. He cannot after that day grant a new trial, nor in any way prevent the consequences of his acts, however erroneous they may be. But he may correct merely clerical errors in his judgments upon the application of a party and proper notice to the other party.(*a*)

CERTIORARI TO QUASH EXECUTION.

But the jurisdiction of the Circuit Court is well established to bring up justices' executions by *certiorari* and quash them when they are improperly issued.

(*a*) Shan. Code, § 4600.

Thus: Where the judgment has been in part paid, and execution is levied for the whole. In this case the execution is brought up and quashed for so much as has been paid, and a *procedendo* awarded to the justice for the balance, and the plaintiff, who was pressing his execution for the whole, has to pay the costs of the *certiorari*. It is different from a case of appeal or *certiorari* in lieu of it, in which, although the plaintiff recovers less than he did before the justice, still he recovers the costs.[69]

So where the whole judgment has been satisfied. And although the payment was by one defendant upon an agreement with the plaintiff that he should not enter satisfaction of the judgment, but should allow the defendant who paid him to have the benefit of an execution in the plaintiff's name to enforce payment by his codefendant, still the latter may bring up a subsequent execution issued against him pursuant to the agreement, and have it quashed upon the ground that it issued upon a satisfied judgment; and further, if a debtor of his has been garnished under the execution, and judgment obtained against him, he may bring up that judgment along with the execution and have it quashed too, it being an incident to the execution.[70]

So where a surety's property is levied on before his principal's It must be an actual levy, however — an apprehension that he will levy not being sufficient — and furthermore, the record of the judgment must show that he was security. And it would have to be stated also that the principal had property that the sheriff could levy on.[71]

And so, where property is levied on which is exempt from execution under the poor laws, the defendant may have the execution brought up and the levy quashed. It is an abuse of process to levy it on property of the debtor

69 Barnes *v* Robinson, 4 Yerg 186.
70 Kincaid *v* Morris, 10 Yerg 252, Baldwin *v* Merrill, 8 Humphr 132
71. Beele *v* Hall, 11 Humphr. 445.

exempted by law from execution, as it is an abuse to levy it after the debt has been satisfied. The justice who issued the execution has no power to correct this abuse, but the Circuit Court, in virtue of its general revisory jurisdiction, may supersede and quash the levy.[72]

§ 33. The writs of *certiorari* and *supersedeas* are obtained by petition, as when they are sought as a substitute for an appeal. But the following differences are to be observed.

1 Two justices of the peace cannot grant the writs. This *certiorari* to quash an execution has no reference to the judgment or its date, nor are "the proceedings of the justice" removed to the Circuit Court, nothing goes up but the execution. It can only be granted by a Circuit judge, either in open court or out of court.[73]

2. The petition has, of course, to give no reason for not appealing, as the party never wanted to appeal The only object of the appeal would be to get clear of an unjust judgment; but in this proceeding it is only the execution, not the judgment, that is complained of. The petition is merely to state facts which show that the execution ought to be quashed.

3. The time that has elapsed since the date of the judgment, and the intervention of the Circuit Courts since, do not affect the application for this *certiorari* — that is, the petitioner does not have to account for the delay. He asks the writ on the ground of the injustice done him, not by the judgment, but by the execution; and however old the judgment may be, it is only when the execution issues that he has any reason to apply for the *certiorari*.[74]

As only the execution is complained of, the judgment and other proceedings need not be brought up, but the *certiorari* will direct the justice to send up the execution.

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72. Jones *v* Williams, 2 Swan, 105
73 Rogers *v* Ferrill, 10 Yerg 254.
74. Baldwin *v*. Merrill, *supra*.

The *supersedeas* will command the officer to desist from proceeding further on the execution; he returns it to the justice "superseded," and gives notice to the plaintiff of the proceeding.

It is only in cases where the judgment is sought to be re-examined that the proceedings are removed by the *certiorari*.[75]

In some of these cases, however, the judgment may be brought up. The execution may be complained of as having issued on a void judgment, and then both may be brought up and quashed. The whole proceedings may in some cases be necessary to show the facts relied on to quash the execution. They might in such cases be brought up by *certiorari*, or might be produced by the justice under a *subpœna duces tecum*.[76]

§ 34. On return of the writ the first inquiry naturally is, whether the case is properly in court, and this inquiry can only arise on the plaintiff's motion to dismiss the *petition*, as the phrase sometimes is, or to dismiss the *certiorari*, as it is at other times, or to discharge the *supersedeas*, as the language is in other cases; all meaning the same thing. The question raised by the motion is, whether the facts stated in the petition, admitting them to be true, are sufficient to quash the execution, or whether, if they are sufficient, they are contradicted by the justice's papers. If they are thus contradicted, or are insufficient, if true, the petition is to be dismissed.

If no such motion is made, or if it is overruled, the petitioner moves to quash the execution upon the grounds alleged in the petition. It is not to be taken that the facts are true, though sworn to, but, unless they are expressly admitted, or appear from the papers of the magistrate, they are to be tried. In some, if not in most of the reported cases, they seem to have been tried by a jury.

75. 10 Yerg 252, 254
76. Arnold *v.* Embry, Peck, 134, 1 Sneed, 290.

The judge may, if he think it proper, submit the issues of fact to a jury, as in other cases of contested facts.[77]

§ 35. The *certiorari* when applied for by STAYERS to quash an execution, is of a peculiar character. It has the same object in view as the *certiorari* just discussed, that is, to quash an execution, but it is usually upon the ground that the petitioner never did legally bind himself as stayer. To stay the execution upon a judgment rendered by a justice of the peace is in legal effect to confess a judgment in favor of the plaintiff jointly with the defendant. It does not assume that form; but in whatever form it may be done, it is in law a confession of judgment, and it is upon that ground that execution issues against the stayer and principal defendant jointly.(*d*)

Although the object of the writ is to quash the execution, still in most cases this is sought to be done on the ground that the judgment on which it issues as to the stayer, is void. This makes it necessary to bring the proceedings before the justice into the Circuit Court. Not for the purpose, however, of having a new trial, and yet it is for the purpose of determining the validity of the judgment against the stayer. It has been settled in Tennessee that the mere voidable character of the judgment against the principal debtor will not release the stayer, that he is not authorized to question its validity in such case, if the principal submits to it. It is not distinctly settled what the stayer's rights would be if the original judgment were absolutely void, but in the case cited in the foot-note, it is perhaps the intimation of the court that he might show that fact in his discharge.[78] A void judgment is in law a nullity, and it would be consonant with reason to say that one could not become bound as stayer

77 10 Yerg 252, 2 Swan, 105, Hollins *v* Johnson, 3 Head, 343.
(*d*) Roberts *v.* Cross, 1 Sneed, 233, 5 Sneed, 374, 2 Heisk 16
78 Taliaferro *v* Herring, 10 Humphr 273 See also Hollins *v.* Johnson, 3 Head, 345.

of execution from it. No execution could in law issue from such a judgment, but if one did, in fact, issue, why not allow the stayer to allege and show the judgment void in support of his motion to quash? Questions of this character, however, are not of frequent occurrence. Usually the question is one of fact only or of intention, to be ascertained from the acts of the party sought to be charged as stayer.

§ 36. Upon all judgments rendered by justices of the peace, the defendant is entitled to a stay of execution for eight months, upon entering good and sufficient security on the docket for the debt, interest, and costs, within two entire days, Sundays excepted, after the rendition of the judgment.[79] This security is the stayer After the lapse of the two days, no stay can be received without the consent of the plaintiff, and if it is received without his consent, it is void, and no execution can run against the stayer.[80] But his consent is presumed unless the contrary appears.[81]

There are several modes in which one may be entered as security so as to become bound as stayer "The essence of the thing is the clearly manifested intention of the party to become bound as stayer in the particular case on the one hand, and the acceptance by the justice of such person as surety for the stay of execution on the other.[82]

If a party, within the two days allowed for staying executions, puts his name on the docket as stayer, in the presence of the justice who assents to it, or if the party enters his name in the absence of the justice who subsequently, but within the two days, assents to it, the party so conducting is bound as stayer[83] If one should enter

79. § 3771, M & V
80. § 3772, M & V , Patrick *v.* Driskill, 7 Yerg 140; 4 Sneed, 550, 3 Head, 717; 2 Heisk 27
81 10 Humphr 273
82. Carmichael *v.* Hawkins, 2 Sneed, 405.
83. Carmichael *v* Hawkins, 2 Sneed, 405

his name as stayer on the docket within the two days, but without the knowledge of the justice, the subsequent knowledge and assent of the justice, after the expiration of the two days, would not have the effect to bind the party as stayer. The acquiescence of the justice alone, after the period fixed by the statute for receiving stay, is insufficient. But if a party should enter his name as stayer, even after the lapse of the statutory period, and in the absence of the justice, the subsequent ratification or acceptance of the act by the justice and the plaintiff in the judgment will bind the party as stayer.[84]

Oral directions given to the justice by one, to enter his name as stayer, is a sufficient authority for doing so, and he need not be present when the justice makes the entry.[85] Nor is it necessary that the direction should be given at the justice's office — it is sufficient if given anywhere within his local jurisdiction, that is, anywhere in the county of his residence.[86] So one may in writing authorize the justice, or any one else, to enter his name as stayer. But the writing must upon its face contain such description of the judgment, the execution on which is intended to be stayed, in some one or more particulars, as will render it reasonably certain that the judgment referred to in the writing is the judgment intended to be stayed; and when the writing thus indicates the judgment, extrinsic evidence is admissible to aid in more certainty identifying it.[87]

There can be no stay for a part only of the debt, nor for a greater or less term than eight months; and a stayer for a less time is bound as stayer generally, but execution cannot issue against him until the eight months expire.[88]

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84 Neil *v* Beaumont, 3 Head, 628

85. Hennegar *v* Mee, 4 Sneed, 33

86. Morgan *v* Coleman, 3 Head, 353, Cheatham *v* Brien, 3 Head, 552

87 Cannon *v.* Trail, 1 Head, 284, Barr *v* McGregor, 11 Humphr. 517; Rhodes *v* Chappel, 11 Humphr. 527

88 Roberts *v.* Cross, 1 Sneed, 233.

An agreement by the plaintiff with the principal to indulge him after the stay expires on payment of part of the judgment does not release the stayer, because it is not binding on the plaintiff. But if the plaintiff receives some new, additional consideration for the indulgence, it binds him to the stipulated indulgence, and releases the stayer.[89]

When a *certiorari* is brought to quash an execution, and not for a new trial, the court can look only to the grounds stated in the petition.[90]

Under the practice formerly existing in Tennessee the applicant for writs of *certiorari* and *supersedeas* to quash an execution was required to give a bond for costs only, and, upon dismissing the petition, the court adjudged the costs alone against the petitioner and his surety, and awarded a *procedendo* to the justice. Now the petitioner is required, as in other cases, to give a bond in double the amount of the debt, and, on dismissing the petition, the justice's judgment is affirmed against the petitioner and his surety with legal interest and costs.[91]

89. Sharp *v* Fagan, 3 Sneed, 541
90. Noel *v.* Scoby, 2 Heisk 20, Hollins *v* Johnson, 3 Head, 346
91 Lownes *v.* Hunter, 2 Head, 343; Mallett *v.* Hutchins, 1 Head, 560.

CHAPTER XIII.

SUMMARY JUDGMENTS.

§ 1. There are various summary remedies provided for in the statutes of the States that are of frequent resort in the course of litigation. The history of a lawsuit would not be complete without some notice of them. The first and principal one will be considered under the head of MOTIONS AGAINST SHERIFFS.

If the sheriff is guilty of any default in the performance of those duties which the law enjoins upon him in the execution and return of process, he is liable by common law to the action of the plaintiff for any damage he may have sustained from the default. But in addition to this, or rather as a substitute for it, at the election of the plaintiff, the statute allows him a summary remedy by motion, for most of the sheriff's delinquencies in regard to executions. The Code of Tennessee enumerates the following cases in which judgment by motion may be had against him:

1. Where he fails to make due and proper return of the execution.

2 When he makes a false or insufficient return.

3. When he fails to pay over money collected on the execution.

We will consider these grounds of motion separately

The first is for NOT RETURNING the execution. An execution must be returned on the first day of the term of the court succeeding its issuance The return is therefore *due* on that day, and a failure to return it then is a failure to "make due return," and subjects him to judgment on motion, although he may return it at a subsequent day.[1]

1 Bershears *v* Warren, 5 Sneed, 676.

No matter at what time, how shortly before the return day, he received it, he is bound to return it. He might probably refuse to receive it if it were tendered to him too late to make a levy; but having received it, he must return it, showing a levy, or no property found, or some other proper return.[2] Merely bringing back the writ is no return. It must have on it a statement of what he has done. That is necessary to make it a proper return.[3] But the *insufficiency* of the indorsement so made, as a response to the command of the writ, will not sustain a motion for a *nonreturn*.[4]

To sustain the motion for nonreturn, the plaintiff will have to prove the following facts.

1. That an execution issued. This fact is sufficiently shown by a copy of the execution certified by the clerk.[5] The oath of the clerk that he issued an execution, of which that which he produces is a copy, will doubtless be sufficient. His certificate is received in order to dispense with his personal attendance.

2. That it was received by the sheriff. This may be proved by the testimony of the clerk or anybody else, that he delivered it, or saw it delivered to the sheriff. The certificate of the clerk that he delivered it is sufficient.[6] The receipt given for it by the sheriff, his signature being proved, is sufficient. So is his acknowledgment, or any other evidence showing he received it. Proof that it was mailed to his address is *prima facie* evidence that he received it in due course of mail. The certificate of the clerk that he mailed it to him is sufficient evidence of that fact, and also of its reception by him, unless he denies it on oath in writing. Then there will have to be other evidence that he received it.[7]

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2 Smith *v* Gilmore, 3 Sneed, 481, 1 Bax. 296. So, even if the execution be against himself. 7 Heisk. 672.

3. Hill *v* Hunter, 2 Head, 128; Watkins *v* Barnes, 1 Sneed 201.

4. Hill *v* Hunter, 2 Head, 128, Watkins *v* Barnes, 1 Sneed, 201.

5. § 4342, M. & V.

6. § 4342, M. & V.

7. § 4343, M. & V.

3 The third fact to be proved is that it was not returned on the first day of the term. The clerk, or his deputies who were officiating when it should have been returned, are generally the only witnesses who can prove the nonreturn. It must be affirmatively proved "When an action is given by law against a party for failing to do an act, it is incumbent on the plaintiff to prove that the act was not performed." If the execution has been returned on some day of the term, the evidence must show satisfactorily that it was not on the first day.[8] The absence of any entry of its return on the execution docket is not sufficient evidence of its nonreturn. As it is the clerk's duty to enter the return if made, and as it is always to be presumed that an officer does his duty, the absence of the entry does raise a presumption that no return was made But it is met by the counter-presumption, that the sheriff did his duty and returned the execution Thus the conflicting presumptions neutralize each other.[9] The clerk's certificate of its nonreturn is made evidence of the fact.[10]

The proof of these three facts will be sufficient to sustain the motion without producing the whole record, or a transcript of it.[11]

It will be a sufficient defense for the sheriff of another county, to prove that he mailed the execution with proper returns on it, addressed to the clerk of the court from which it issued [12]

It is also a good defense that the nonreturn was caused by the instructions or intermeddling of the plaintiff.[13] But it is not a good defense that the plaintiff caused an *alias* execution to issue after a failure to return the original in due time. The nonreturn of the original fixes the sheriff's liability, and the attempt to make the money out of the

8. Roberts *v* Bostwick, 6 Humphr 232
9 Gibson *v* Martin, 7 Humphr. 128
10 § 4342, M & V.
11 § 4342, M & V 12. § 4345, M & V.
13 Robinson *v* Harrison, 7 Humphr. 189.

defendant cannot be construed into a relinquishment of the plaintiff's right against the sheriff.[14] The fact that the plaintiff authorized him to return the execution *to be renewed,* has no other effect than to postpone the sale under that writ, and to obtain another It is no legal excuse for his not returning it [15]

§ 2. The next default for which judgment by motion may be taken against the sheriff is where he makes a FALSE RETURN of an execution The false return which will warrant a judgment on motion must be such a one as appears on its face to be false. If it requires extraneous evidence to show its falsity, the plaintiff must resort to his regular common-law action, that is, he must issue his writ and prosecute his suit in the ordinary course of a lawsuit [16] It will rarely happen therefore that this summary remedy by motion for false return can be resorted to An instance of a return false on its face would be that property was levied on too late to be sold, when, in fact, the date of the levy shows that there was time enough for the sale.

But although the date of the levy may show that it was made a long time after the execution came to the plaintiff's hands, and although the fact may be that he could have levied long before he did, and thus have had time enough to sell before the return, still it will not be a false return. The fact that he might have levied before he did does not make it untrue that he did levy when his return says he did. It will only prove that he was guilty of negligence in not levying sooner, and for that he is not liable to judgment by motion. If from the date of his actual levy, as indorsed on the writ, to the return day, there was not time to advertise and sell, his return is not false.[17]

14. Doyle *v.* Glenn, 4 Humphr. 309; Barnes *v.* White, 2 Swan, 442

15 Beshears *v* Warner, 5 Sneed, 676

16 Fussell *v* Greenfield, 1 Sneed, 437

17. Trigg *v.* McDonald, 2 Humphr 386.

It is decided in Trigg *v.* McDonald that the plaintiff waives his action or motion against the sheriff for a false return by accepting so much of the money as the sheriff has made under the execution. In Barnes *v.* White, the court say it must appear that he accepted the money with a knowledge of the falsity of the return.[18] But it is said in the latter case that the same rule will not apply to a case of nonreturn or insufficient return, at least not where the money accepted is made by an *alias* execution issued after the default.

The most common instance of false return is, that no property could be found, when, in fact, there was property. But, for a false return of this character, the plaintiff must resort to his common-law action, unless the return itself shows there was property. To sustain his action, he would have to show that there was property, and that the sheriff was informed of it, and even then, if he had no opportunity to levy on it, he would not be liable He might be pressed with business of the same sort, under executions of prior date, which would render it impossible to attend to the plaintiff's execution until property that he knew of had been removed beyond his reach.[19]

So, after levying on property, and taking a bond of indemnity, the sheriff may still return *nulla bona,* and not be guilty of a false return He may show that the title to the property was not in the defendant, and that will establish the truth of his return.[20]

If the defendant's title to the property is disputed, whether the question of title were a difficult or plain one, his return of no property found is not a false return, unless the plaintiff gives him a bond of indemnity.[21] And it is not necessary to his defense that he should notify the

18 2 Swan, 442
19. Trigg *v* McDonald, 2 Humphr 386
20 Humblet *v* Herndon, 3 Humphr 34.
21 Saunders *v* Harris, 4 Humphr 73

plaintiff that the title is disputed, or demand an indemnity bond. [22]

No other evidence is necessary than the production of the execution and the returns on it, or a copy thereof certified by the clerk. The return itself is the only admissible evidence of its falsehood.

§ 4. The next default to be mentioned in this connection is an INSUFFICIENT RETURN of an execution by the sheriff. There is to be observed a difference between a return which may indicate negligence in the sheriff and one which is insufficient. Thus an execution may issue and be delivered to him June 30th, returnable September 13th; and his return may show that it was levied September 1st on goods So great a lapse of time would indicate that he had not been sufficiently diligent in hunting for property. His return may show further, that when he did levy, at so late a day, he took a bond for the delivery of the property on the 13th, the return day of the writ, and the bond was then forfeited. This return is sufficient; it shows a levy on property in time to sell before the return day, and a reason why it was not sold, and the money made, that is, the forfeiture of the delivery bond. The court cannot say that the sheriff was guilty of negligence. He might have searched for property with all diligence, and not been able to find it till he made the levy The law gives no motion for negligence If the plaintiff would charge the sheriff with negligence, he must bring a common-law action for damages [23] But where the levy is made too late to advertise and sell before the return of the writ, and the time elapsed from the date of its delivery to the sheriff affords strong evidence of willful neglect of duty in not levying sooner, and his return gives no explanation of the delay, it is considered an insufficient return [24]

22 State *v* Sharp 2 Sneed, 616
23 Rains *v* Childress, 2 Humphr. 449
24 Eakin *v* Boyd, 5 Sneed, 205

As in the case of a nonreturn, so in the case of an insufficient return, it is no waiver of the plaintiff's right that he has had issued an *alias* execution, although part of the money may have been thereby made and received by him.[25]

It is no sufficient response for the sheriff to return that he has made the money, and retains it for damages due him from the plaintiff on a bond of indemnity given by the plaintiff in another case.[26] He must sue on the indemnity bond, and get a judgment for the damages.

But it is a good return that he has made the money and applied it to the payment of another execution in his hands against the plaintiff.[27]

If the execution is void, as if there be no judgment, or the court had no jurisdiction to render the judgment, the sheriff is not bound to execute it, he will, in fact, be a trespasser if he does. No judgment can therefore be obtained against him for not returning it, or for an insufficient or false return, or for not paying over money he may have collected. The plaintiff can have no advantage whatever from such an execution. But a merely voidable or irregular execution must be duly executed and returned; and the sheriff is subject to the same liabilities for default as if it were perfectly regular. It is for the defendant alone to complain of the irregularity by obtaining a *supersedeas* and having it quashed. Thus, if the judgment is against two, and the execution against one, if the latter does not supersede it, the sheriff must execute it.[28]

The production of the execution, with the sheriff's return, or a copy thereof, duly certified by the clerk, is sufficient to sustain the motion.[29] His return on it is evidence

25. 2 Swan, 442, 4 Humphr. 309
26. Hinkle *v* Blake, 2 Humphr. 574
27. Dolby *v*. Mullins, 3 Humphr 437
28 Reams *v*. McNail, 9 Humphr 543, Stevenson *v*. McLean, 5 Humphr. 332; Shaw *v*. Holmes, 4 Heisk 695.
29. § 4342, M. & V.

enough that he had received it, and the return itself is the only evidence of its sufficiency or insufficiency.[30]

§ 5. And, finally, the default of the sheriff in FAILING TO PAY OVER THE MONEY collected by him on an execution. To sustain the motion for this default two facts must be established in the proof: First, it must be shown that the sheriff collected the money. The execution itself, or a copy of it, certified by the clerk, with the sheriff's return thereon showing the collection, is sufficient evidence of the fact; and, indeed, it would seem upon authority that the face of the return is the only evidence that can be looked to in determining the fact of collection.[31] If the sheriff suppresses this evidence by failing to make any or a proper indorsement on the execution, the plaintiff must rest his motion upon some one or more of the other grounds above mentioned, or resort to his action at common law. The second fact to be established is the failure of the sheriff to pay over to the party entitled the money collected on the execution. When a debt is shown to be due, it is presumed to be unpaid until the debtor proves payment It would rarely be possible for the creditor to prove nonpayment But it is practicable to prove nonpayment by the sheriff of money collected on execution He is to return the money with the writ and pay it to the clerk, who can prove its nonpayment to him, if such be the fact The rule laid down by the Supreme Court in relation to the nonreturn of the execution would seem to apply equally to

30 Fussell *v* Greenlief, 1 Sneed, 437

31. Fussell *v* Greenlief, 1 Sneed, 437, and cases there cited It may well be doubted whether the text is sustained by these authorities They do distinctly hold that nothing but the face of the return can be looked to in motions for a false or insufficient return. There is no express adjudication applying the rule to the extent stated in the text, but the principal case cited is favorable to that view, and supported as it is by the construction of the learned author, as expressed in former editions of this work, the text may be accepted by the courts as the law But compare the Act of 1835, under which 1 Sneed case was decided, with the present act, § 4338, M & V. Code

the nonpayment of the money: "When an action is given by law against a party for failing to do an act, it is incumbent on the plaintiff to prove that the act was not performed.[32] Here a summary action is given against the sheriff for failing to pay over money collected. It must be proved that he has not done it. The clerk or his deputy is the proper and usually the only witness to prove "that the act was not performed." If he does show that the sheriff has never paid it into the office, then it will be presumed it has not been paid at all. It is true the law requires the sheriff to pay it to the plaintiff if he demands it before the return of the writ. But the writ commands him to have the money at court unless so demanded. If it was intercepted in its regular course by any such special demand and payment, the sheriff must prove it. When it is shown that it has not been paid over according to the regular course of the law, he must show how it was diverted from that course

The proof of these two facts will sustain the motion unless the sheriff shows some good legal reason for not having paid over the money. Equitable defenses are allowed as they would be in an action on the case.[33] It is so in all these summary proceedings. Whatever defenses might be made in a common-law action for the same cause may be made to the motion, except where the statute giving the motion may be too imperative in its terms to admit such defense.[34]

It is no defense for the sheriff that he has paid the money to one not authorized to receive it, as, if the plaintiffs are partners, and one of them sells the judgment to A for an article in which the partnership does not deal, and the sheriff pays the money collected to A., the firm is entitled to judgment on motion against the

32. Roberts *v.* Bostick, 6 Humphr. 232
33 Wells *v.* Grant, 4 Yerg 494
34 Billingsley *v.* Rankin, 2 Swan, 84.

sheriff.[35] But if the sheriff pays the money to the plaintiff without any knowledge that he is not beneficially entitled to it, that is a good defense to a motion made by the real beneficiary.[36] And to apply the money to an execution he holds against the plaintiff by his direction, and to return it satisfied, is the same thing as to have paid the money to the plaintiff.[37] As the sheriff may levy an execution in his hands against the plaintiff on money collected for him, if he does do it, and thereby satisfies the execution and returns it satisfied in this way, and returns on the plaintiff's execution that he has thus applied the money, whether by his direction or not, the plaintiff can have no judgment against him.[38]

§ 5a. It is now proper to consider the mode of procedure in obtaining judgment against the sheriff for one or the other of the official defaults above mentioned. It is a principle of the common law and of common justice that no judgment shall be taken against a man without some previous notice to him of the time and place, so that he can be present and defend himself But the statute law has made some exceptions to this rule; and, among others, the four cases of default in regard to executions, which we have been considering. "No notice of the motion is required, if made at the return term of the process." The motion can only be made "in the court to which the process is returnable," and at that court it is the duty of the sheriff of that county to attend, and give an account of his doings under all processes returnable at that time. He is therefore presumed to be present and ready at that term of the court to meet any motion that may be made against him for an alleged default. No notice therefore would seem to be neces-

35. Vance *v* Campbell, 8 Humphr 524
36 Atkinson *v* Cooper, 2 Humphr 360.
37 Atkinson *v* Cooper, 2 Humphr. 360.
38 Dolby *v.* Mullins, 3 Humphr. 437.

sary; the law has given him notice to be ready then, with a due return of the writ and the money, or to account for any apparent defalcation.[39]

Here is both presumed presence and presumed readiness to meet the motion. At a subsequent term one of the reasons for dispensing with notice exists, and that is his presence, but the other is wanting — that is, his presumed readiness to account for the imputed failure of duty in regard to the return of the writ or money. The law therefore requires notice of the intended motion.

The Code of Tennessee does not expressly require notice even in that case; but it is implied in the provision that no notice is required if made at the return term. It would also be required on the principle that notice is necessary in all cases unless dispensed with by statute.[40]

§ 6. If the execution issues to the sheriff of another county, he is not bound to leave his county and be personally present with it to make his return. He may mail it in his own county, addressed to the clerk who issued it, with a proper return indorsed upon it, and that will be a sufficient defense to a motion for a nonreturn.[41]

But by a somewhat singular construction of the Code of Tennessee the Supreme Court of that State have held that the fact of the nonresidence in the county of the sheriff does not, with a single exception, change the rule, and that the motion may be made and judgment obtained against such nonresident sheriff the same as if he were resident of the county — that is, without notice, if the motion be made at the return term of the process. The exception is where the fact that the writ came to the hands of the sheriff is to be made out alone by the certificate of the clerk that he mailed it to the sheriff, and the latter, under oath, denies the receipt of it. In such

39. §§ 415, 4329, 4333, M & V
40. Williamson *v* Burge, 7 Heisk 119
41. § 4345, M & V

a case it is said notice must be given to the sheriff of the intended motion. But if the fact of the receipt of the execution by the sheriff is to be made out by any other means than the clerk's certificate, notice is not necessary.[42] The reasoning of the court in establishing this solitary exception is not satisfactory. It might have been held with equal plausibility, and certainly more consistently with common justice, that notice should be required in every case where the sheriff is a nonresident of the county. Such was the law of the State before the adoption of the Code[43] Summary proceedings are in derogation of the common law, and the statutes authorizing them must be strictly construed, and upon this principle if it be a question of doubt in any case as to the defendant's right to notice, that doubt should be resolved in favor of giving notice; or, in other words, the courts should not hold a party entitled to his motion without notice unless the right to it be given in plain and unequivocal language, for it is a favorite and fundamental principle that parties shall have their day in court.[44]

§ 7. In all cases requiring notice, five days' notice of the time and place of motion, if in the judicial circuit of the defendant's residence, and ten days, if in another circuit, is sufficient.[45] "The place of motion" must be the court to which the execution is returnable.[46] If therefore the sheriff resides in the circuit which includes that court, he is to have five days' notice; if in another, ten days, where he is entitled to any notice at all.

The notice is not process, but a private paper — the individual act of the party who gives it.[47] Process is the act of an officer. The service of it brings a party into

42. Lane *v* Keith, 2 Baxt. 191, Reese *v* Creson, 1 Baxt. 459
43 Car. & Nic. 300.
44. Williamson *v* Burge, 7 Heisk 119.
45. § 4331, M & V
46. § 4333, M & V
47 Watkins *v* Barnes, 1 Sneed, 201.

court, there to remain until he is discharged. But the service of notice does not. It is not the commencement of a suit. There is no suit in court till the motion is made. The notice is information to the sheriff that the suit will be commenced at the time and for the cause specified

It is to let the sheriff know: 1. At what time 2 In what court. 3. By whom. 4. For what default. 5. On what execution the motion is to be made against him. If it is certain enough to inform him on these points, it will do.

1. At what time. The time ought to be a certain day of the month and year, or a certain day of the term. To inform the sheriff that a motion would be made at a certain term of the court, could hardly be considered sufficient It is the character of process to summon a party to appear at the term of court, and he is to remain in court until discharged. But when *notice* of time when an act will be done is required by law, a certain day is usually meant It has been decided, however, in Tennessee, to be sufficient to give notice that the motion will be made at a certain term of the court [48]

2 In what court. This must be the court in which the execution was returnable.

3. By whom This is the plaintiff in the execution Another may be beneficially entitled to the judgment, but the motion is to be in the name of the plaintiff [49]

Witnesses, clerks, and other officers entitled to costs on the execution are also allowed the motion for the amounts respectively due them, and interest thereon. They, however, can only move for themselves when the plaintiff fails to do so. When he makes the motion, it is not only for what he is entitled to himself, but for all

48. State *v* Allison, 8 Heisk 6
49. Clingman *v* Barrett, 6 Humphr. 21.

the costs in the case, and this necessarily suspends the right of others to move.(*a*)

4. For what default — whether for the nonreturn of the execution, an insufficient or false return, or failing to pay over the money collected The object being to give the sheriff a chance to defend himself, he ought to know what the charge is, that he may prepare for his defense As a motion made on one ground cannot be sustained by showing another,[50] so a notice of motion to be made on one ground will not sustain a motion on a different ground.

5. On what execution. It should be described by specifying the names of the parties to it, from what court it issued, and when it was returned, or was returnable. The amount of it need not be given, unless there were two executions for different amounts, and answering to the description in other respects. If the execution were against A and B, a description of it in the notice, as an execution against A., is sufficient [51]

The following form of notice is sufficient:

Form of Notice.

Mr. Winfield Scott:

On the 25th day of January, 1887, in the Circuit Court of Wilson county, I will move for judgment against you and your securities as sheriff of Wilson county, for not returning (or, for an insufficient return, or a false return, or, for not paying over the money collected by you on) an execution issued to you from the Circuit Court of Wilson county on the 25th July, 1886 (or at the May term, 1886), returnable to the September term thereof, 1886, for the sum of one thousand dollars and costs, in my favor as plaintiff against John Den, defendant This 10th December, 1887. JAMES PRICE.

§ 8. It is made the duty of the sheriff "to serve in due time any delinquent officer with a copy of any notice of motion placed in his hands to be served on such officer,

(*a*) § 4340, M & V, Hand *v* State, 5 Humphr. 515.

50. 1 Sneed, 201

51. McMullen *v* Goodman, 4 Humphr 240

and return the original notice in due time to the clerk of the court in which the motion is to be made, with his indorsement of service" If the sheriff is still in office, he will be incompetent to perform this duty; and in all such cases the coroner is to discharge the duties of sheriff. A constable may execute *process* from a court when the sheriff and coroner are both incompetent; but the notice not being process, it might be doubted whether a return of the original, with his indorsement of service, would be sufficient evidence of the fact. The general rule is that when it is not made the duty of an officer to act, or when the law does not give him the power to act, his record or certificate that he has performed the act is not evidence of the fact Not being on his official oath, because not within his official authority, he has, like any other witness, to swear to the fact. But the notice being analogous to process, and the spirit of law being to substitute the constable for the sheriff where the coroner cannot act, it would require no great stretch of law to treat his return as sufficient The notice being a private paper, it may be served by any private person; but then he must prove the service as a witness.

The form of notice above given is addressed to the sheriff alone, and service on him alone is sufficient. Although judgment may be rendered against his sureties, they are entitled to no notice [52]

The sheriff may waive the notice It is considered a waiver if he appears and defends.[53] But if he appears and excepts to the motion for want of notice, or for its insufficiency, this is no waiver [54] His presence is no waiver, but his presence and defending without asking any advantage of the want of sufficient notice is. The design of the notice is not only to have him present, but

52 Young v. Hare, 11 Humphr 303.
53. Young v. Hare, 1 Sneed, 201.
54. Chaffin v Crutcher, 2 Sneed, 361.

to give him time and opportunity to defend himself. And so, if the notice is not served in time; if it so vaguely or falsely describes the execution that the sheriff could not be expected to understand what writ was intended; or if the ground of the motion is not stated, or the time or place, the sheriff may well except to the motion on the ground of insufficient notice.

The sheriff has at all times, before or after the notice, a right to amend his return. But after the motion is made, he cannot, the suit is then commenced, and he is not allowed to extricate himself from it by his own act [55]

§ 9. The motion must be made at the time specified in the notice; otherwise a new notice has to be given, unless the defendant waives notice.[56] It is an action or suit, and the motion is the commencement of it The plaintiff may be required to give security for costs, as in other suits.[57] If not so required, he does not give security, as a matter of course. When the motion is made, it is entered on the minutes, but it is not to be tried until it is regularly reached It cannot be allowed to displace other business, except where the State is plaintiff The motion fixes the case in court, it takes its place on the docket, there to await its turn It may be continued until the next term, as other cases may.[58]

§ 10. The judgment may be had against the sheriff alone. And he is liable for the defaults of his deputy as well as of himself. The deputy is liable alone to the sheriff.(*a*) But the right to the motion against the sheriff carries with it the right to move against him and the sureties on his official bond.[59] The plaintiff usually avails

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55. Broughton *v* Allen, 6 Humphr 97, 2 Head, 126; 2 Coldw. 459

56 Cheatham *v*. Harwell, 7 Yerg 314; State *v* Allison, 8 Heisk. 5

57 § 4332 M & V , State *v* Allison, 2 Swan, 374.

58 Kennedy *v* Smith, 7 Yerg 473

(*a*) 7 Coldw 159, 3 Humphr 85 59. § 4327, M & V

himself of this right, and moves against the sheriff and his sureties, not by description, but by name. But if he moves against any of the sureties, he must include them all, unless some of them are dead.[60] The statute must be strictly construed, its language is, that judgment may be had against the sheriff "and the sureties on his official bond;" not a part, but all of them. It applies the common-law principle, that when the obligation is joint the action shall be joint against all the living parties, and against the survivors only where one or more of the parties be dead.[61]

A motion may be made against the person in default, and such other persons made liable with him as may be in existence at the time of the motion.[62] No motion therefore lies against the representative of a deceased surety. If all the sureties be dead, the sheriff alone is liable to the motion, and if he be dead, the motion will not lie against his representative.[63] But if the sheriff or any one or more of his sureties die *after* the motion is made, the suit thus commenced may be revived against his or their personal representatives, the same as other suits are revived.[64] This close construction which restricts the right to make the motion against living parties only does not leave "the party aggrieved" remediless. He may maintain his common-law action on the bond; and in that he may include all or any number of the obligors who are living, and the personal representatives of such as may be dead.

§ 11. If the sheriff has made no levy on an execution in his hands when he goes out of office, he is bound to deliver it to his successor, and therefore his securities are

60 Gibson *v* Martin, 7 Humphr. 127.
61. Rice *v.* Kirkman, 3 Humphr 415, Hearn *v* Ewin, 3 Coldw. 399
62 § 4326, M & V , Park *v* Walker, 2 Sneed, 505, 3 Sneed, 482
63. State *v.* Deberry, 9 Humphr. 605
64 § 4341, M & V.

not liable for the nonreturn of it.[65] And if the same sheriff is re-elected, those who were his securities at the time he was guilty of the default for which the motion is made are liable.[66]

§ 12. The motion is to be tried by the court There is no necessity or propriety in submitting the matter to a jury. It will not, however, vitiate the judgment if it is done. It is improper, irregular, and embarrasses the case, but is not fatal[67]

If a judgment is sought against the sureties, a copy of the sheriff's bond, duly certified by the clerk of the County Court, must be produced, in order to show who are the sureties. And, although the bond may be informal and defective, the party aggrieved by a breach of it is entitled to all the remedies which he might have maintained on the official bond if one had been executed, approved, and filed according to law.[68]

The sureties may voluntarily appear and defend the motion, and if they do, the admissions of the sheriff made subsequent to the act or default for which the motion is made are not evidence against them. But if, as is usually the case, they do not appear, then such admissions, being good against the sheriff, will necessarily operate against the sureties. For, if judgment goes against him, it will be rendered against them also; and the admissions may be the very ground upon which it is rendered against him. The only remedy for them, in such case, is a writ of error *coram nobis,* to reverse it But in that proceeding the judgment would be held *prima facie* just and valid, and the onus would devolve on them of disproving its justice[69]

§ 13. The judgment is to be for the amount due on the

65 Fondrin *v* Bank, 7 Humphr 447
66. Sherrell *v* Goodrum, 3 Humphr 419.
67. Fussell *v* Greenlief, 1 Sneed, 442.
68 § 4327, M & V.
69 Young *v.* Hare, 11 Humphr 303; 1 Greenl Ev., § 187

execution, and twelve and one-half per cent. damages.[70] The items which make up the amount due on an execution are the principal debt, the interest on it, and the costs. We have seen that when the motion is made by the plaintiff he not only recovers the principal and interest, but also the costs. In the original judgment he recovers the costs as well as the debt; they therefore are legally *due* him, the officers and witnesses entitled to them being only allowed to move for them in the event he does not This saves the inconvenience of rendering numerous judgments against the sheriff for the same defalcation.

The twelve and a half per cent. damages are to be calculated on the interest as well as the principal. The interest is a part of the amount due, and the damages are given on the whole amount due [71] The costs is also a part of the amount due on the execution, but interest without damages on the costs is all that is given when the persons entitled to it move against the sheriff themselves, and it would seem that, as the plaintiff in the execution recovers for them, he ought to recover only what they would if they moved for themselves [72]

The twelve and a half per cent given does not mean twelve and a half per cent interest, but gross damages. Thus, if the amount of the judgment on which the execution issued was sixteen hundred dollars, and the interest on it to the time of rendering judgment was thirty-two dollars, making sixteen hundred and thirty-two dollars, "the amount due on the execution," the damages would be two hundred and four dollars. This would make eighteen hundred and thirty-six dollars, the amount to be recovered, with the addition of the costs, and the interest thereon

If the motion is for the nonreturn of the execution, the whole amount due on the execution is recovered, no mat-

70 § 4338, M & V. 71. Dunnaway *v* Collier, 2 Heisk. 10.
72. § 4340, M. & V.

ter what amount the sheriff may have made, or whether the defendant were totally insolvent or not.[73] The insolvency would be a good defense to a common-law *action on the case,* and the plaintiff would only recover the amount of his actual damage; and if the defendant was insolvent, and no money could have been made out of him, the plaintiff would recover only nominal damage from the nonreturn.[74] But under a late decision in Tennessee this distinction is repudiated, and in an action for *nonreturn* the sheriff was not allowed to rely on the insolvency of the defendant.[75]

If, before the motion is made, the sheriff has paid a part of the money, judgment can only be rendered for the balance. What has been paid cannot be considered as any part "of the amount *due* on the execution." The plaintiff is entitled "to twelve and a half per cent. damages on the amount due," that is, on the balance, after deducting the payments made. Upon this principle, if the whole has been paid before the motion is made to the persons entitled to it, there could be no judgment for any amount, as there would be nothing due. Certainly, if all the persons interested in the execution have been paid before its return, it would be unreasonable and unjust to give to them a judgment by motion against the sheriff for the nonreturn merely of an execution in which they had no further interest. If the return of the execution merely was a matter of any consequence to either party, that should be enforced by a rule on the party to return it.[76]

The same principle, in regard to the deduction of payments from the nominal amount of the execution, will equally apply where the motion is for the insufficiency of the return, for false return, or failure to pay over the

73 Webb *v* Armstrong, 5 Humphr. 379.
74. Wood *v.* Orr, 10 Yerg. 507.
75 Fowler *v* McDonald, 6 Heisk. 532.
76. Smith *v* Van Bebber, 1 Swan, 110.

money collected. It is only for "the amount due on the execution," and twelve and a half per cent. on it, that judgment can be recovered, and if there be nothing due there can be no judgment.[77]

§ 14. The judgment should show all the facts that are necessary to sustain it In common-law actions the pleadings show what are the facts in controversy, and the verdict shows how those facts are found. The pleadings are a part of the record, and can be referred to to see what the facts in issue were. So the processes, with the returns on them, show how the court came to have jurisdiction of the parties and the case. But the very first step in these summary proceedings is the motion, and the only record evidence as to what was in controversy, and upon what grounds the motion was made and sustained, is the entry of the motion and judgment. It therefore ought to show that every fact appeared to the court that was necessary to give it jurisdiction.[78] Where notice is necessary, the record ought to show either that notice was given, or that the defendant was present defending, without excepting for want of notice, for the court has no jurisdiction without notice or waiver of it.

The motion is generally made on one day and disposed of on some subsequent day of the term. In that case it may be entered thus:

Motion.

James Hart
v.
Winfield Scott and Andrew Jackson.

The plaintiff moved the court for judgment against the defendants for the failure of the defendant, Scott, sheriff of Wilson county, to return an execution for one thousand dollars and costs in favor of the plaintiff against one James Smith, issued on a judgment rendered at the May term of this court, 1887, on the 1st day of June last, directed and delivered to said sheriff, returnable to the present term.

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77. Young *v.* Donaldson, 2 Heisk. 52.

78 Ragsdale *v* State, 2 Head, 416, Barry *v.* Patterson, 3 Humphr 314; Savage, *ex parte*, 4 Baxt 337.

Andrew Jackson, the other defendant, is the surety of the sheriff. When the motion is disposed of, the final entry may be in this form, after stating the parties' names as above:

Came the plaintiff (or "came the plaintiff and the defendant, Scott," *if the sheriff appeared, or,* "*came the parties,*" *if the surety* also appeared), and, on his motion, it appearing to the court that the defendants executed and acknowledged a bond before the County Court of Wilson county, on the 1st day of April, 1886, in the sum of twenty thousand dollars, payable to the State of Tennessee, with condition to be void, if the defendant, Scott, sheriff of Wilson county, should well and truly execute and due return make of all process to him directed, and pay all fees and sums of money by him received or levied by virtue of any process into the proper office, or to the person entitled, it appearing further that on the 1st day of June last, the clerk of this court issued an execution, directed to the sheriff of Wilson county, commanding him to make of the property of James Smith the sum of one thousand dollars and the costs thereon indorsed, which amounted to two hundred dollars, to satisfy a judgment for that sum, obtained in the Circuit Court of Wilson county, on the 21st day of May, 1886, in favor of the plaintiff against the said James Smith; it appearing further that said execution was delivered to said sheriff, W Scott, on the 2d day of June, 1886, and that he has failed to return said execution to the present term of this court (or, returned said execution "not satisfied," which the court considers an insufficient return, or returned said execution "satisfied," and has failed to pay over the money collected, or returned said execution "levied on ten mules, 1st August, 1886, not sold, for want of time," which the court considers a false return), it is therefore considered by the court, that the plaintiff recover of the defendants the sum of one thousand and twenty dollars, the amount of the judgment and interest thereon to the present time, and one hundred and twenty-seven dollars and fifty cents, being twelve and a half per cent damages thereon, and also two hundred dollars, the costs indorsed on said execution (and four dollars, the interest thereon, and twenty-five dollars, damages thereon), and also the costs of this motion

This entry contains: 1. The recital of the sheriff's bond, which is the contract on which the surety becomes liable for his conduct, and which contains a conclusive acknowledgment of his sheriffalty

The production of the bond is not necessary to charge the sheriff. He makes himself liable by assuming to act as sheriff. He cannot shuffle off the responsibility of a character which he has assumed by taking the execution

as sheriff. But the sureties are only responsible upon their contract that the sheriff should perform his duty. And whenever you seek to charge any man on his written contract you must produce it; it must appear somewhere on the record that he made the contract, and, as there are no pleadings in these summary proceedings to show it, the judgment must show it

2. A recital of the facts which show a breach of that bond, the execution delivered to him, and his nonreturn, insufficient or false return, or failure to pay the money

3. The judgment. The costs are included in a separate item, as they belong to others than the plaintiff.

If it is a case where notice has to be given, that fact may be stated immediately after the alleged default, thus:

It appearing further that the defendant, Scott, had written notice on the 10th day of September that this motion would be made on the 21st, it is therefore considered, etc.

If the sheriff is still in office, the execution will be addressed to the coroner, and, if he too be incompetent, to any constable. Should he, whether coroner or constable, be guilty of a like defalcation, a like summary judgment may be had against him and his sureties.

§ 15. When a judgment has been obtained against the sheriff or other officer for any of the foregoing defalcations, he has no remedy against the defendant in the execution. It is a wrong of his own in which the defendant had no concern; and it is a rule of law that a man is to have no advantage from his own wrong. Thus, a judgment is taken against him for not returning an execution which he has not levied on property, and upon which there has been no payment, and he pays up the summary judgment, the debt of the defendant in the execution is thereby discharged. The creditor is satisfied; he can obtain but one satisfaction, and he has obtained that of the sheriff. But the sheriff, having involved himself by his

own wrong, can have no recourse against the defendant. He has no equitable claim to be substituted in the place of the creditor against the debtor, whose debt he has been compelled to discharge.[79] Whenever, indeed, in any case, the sheriff pays the plaintiff unconditionally, that is, without any contract with him that he, the sheriff, shall have the benefit of the judgment, he cannot afterward enforce the execution. It is *functus officio;* it has performed its office, and is dead.[80]

The case is different with the sheriff's sureties. They are innocent; and if they have the judgment to pay, they are very justly substituted to the place of the plaintiff against the defendant whose debt they have paid. Whenever a judgment by motion, or action at law, is had against a sheriff, coroner, or constable, and his official sureties, for a failure of duty in and about an execution, and the amount of such judgment has been paid by the sureties, the sureties are entitled, at their cost and risk, to issue an execution for their benefit on the original judgment about which the recovery was had. But they must give security for the costs and damages that may accrue from this new aspect of the case.[81]

There are two cases in which the sheriff may, by virtue of the execution, have received money which he is bound to pay to the defendant. One is where the property levied on and sold has produced more money than is sufficient to satisfy the execution. The sheriff is not to make an *excessive* levy, that is, he is not to levy on an amount of property which bears an enormous disproportion to the amount of the debt But it will often happen that it is his duty to take considerably more than enough. Another case is where the money he has collected is enjoined in his hands by the order of a Court of Chancery.

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79 Doyle *v.* Glenn, 4 Humphr. 310
80. Harwell *v* Worsham 2 Humphr 524.
81 §§ 3710, 3711, M. & V.

In these and any other cases in which the defendant is entitled to money "paid or collected on execution," if the sheriff fails to pay it over to him on his demand, he may have judgment on motion against the sheriff and his sureties for the amount he is entitled to, with interest and damages.[82]

No notice is necessary if the motion is made within six months after the right to the motion has accrued, which is whenever demand is made and payment refused.[83] The motion would have to be made in the court to which the execution was returnable.[84]

The evidence would be the production of the execution and the return, showing the money paid or collected on it and the defendant's title to it Where it has been enjoined, the injunction certified by the clerk of the Chancery Court would have to be shown. The execution itself would show that the plaintiff was entitled to it The injunction would show that the plaintiff's title had been superseded. So, whatever process has given the defendant a title to the money must be shown.

§ 16. The constable is the proper officer to execute process issued by justices of the peace, but the sheriff may do it also; and so may his deputy.[85] Executions issued by justices are to be returned within thirty days after the date of their issuance.[86] The officer who fails to make due return of them, or to pay over the money collected, or makes a false or insufficient return, is liable to the same judgment on motion that the sheriff is liable to for default in regard to Circuit Court executions. Justices of the peace may render the judgment; but the Circuit Court has concurrent jurisdiction with them.[87]

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82. §§ 4336, 4339, M & V.
83. § 4329, M & V
84. § 4333, M & V
85. § 4992, M & V.; Bank *v.* Lowe, Meigs, 225.
86. § 3737, M. & V.
87 §§ 4334, 4335, M. & V.

If the default consists of failing to pay over money received without execution, and the amount does not exceed the justice's jurisdiction, or, if the default is a failure to pay over costs collected on an execution, the motion may be made before any justice of the peace in the county where the default occurred. But if it be a failure to return the execution, or to pay over the debt collected on it, the motion must be made before the justice having custody of the papers, or in the Circuit Court which has concurrent jurisdiction.[88]

Constables are in all cases entitled to notice of the time and place of motion, and, by parity of reason, those also who are acting in the proper place of a constable, as the sheriff, is in the execution of process issued by a justice of the peace.[89]

In support of the motion for failing to return the execution, it ought to be shown: *First* That the officer has had the required notice. Without this the court has no jurisdiction of the motion, unless he appears and waives it. *Secondly.* That the justice issued an execution; that it was directed to the officer and received by him. These facts are made the basis of the motion by the express provisions of the law[90] A justice's execution is usually directed "to any lawful officer," which comprehends constables, sheriffs, and their deputies Its issuance may be proved by the justice himself, or by any other witness who knows the fact[91] If it has been returned, it should be produced, and a *subpœna duces tecum* is as necessary to compel the justice to produce it, as it is to compel any other witness to attend with a paper. But a copy of it certified by him, together with the officer's return on it, is legal evidence[92] That it was received by the officer has

88 §§ 4333, 4344, M & V.
89. § 4330, M & V
90. § 4338, M & V
91. Osburne *v* State, 9 Yerg. 489.
92. § 4940, M. & V.

to be proved. If it has not been returned, the testimony of any witness who knows it will suffice. If it has been returned with an indorsement by him of his proceedings under it, it will be sufficient evidence that it was in his hands If the motion is for not returning it, the justice alone ordinarily will be the only witness who can prove it. The justice's certificate of the fact does not seem to be made evidence of it, as the clerk's is.

If the motion is for not paying over money collected, the return of the execution will usually show that it is satisfied. Is there to be any negative proof that he has not paid it? Or is the onus on him to prove that he has paid it? We have seen under this head, in regard to motions against the sheriff for not paying over money collected under court executions, that there had to be proof against him that he had not paid it into the clerk's office, as the writ and law command him to do, unless he has previously paid it to the plaintiff. But in that case there is a legal official repository provided for him to return the money to, and the proof is easy that it is not there No such repository is provided for money collected under a justice's execution The justice is not entitled to receive it There is no express provision of law to this effect, however. But the absence of any express provision that he shall receive it and pay it out, the fact that no security is required of him to indemnify those whose interests are involved, would lead to the conclusion that he was not intended to be the legal depository of the money. It is expressly provided that the sheriff shall pay the money collected under a justice's execution to the party entitled thereto, or his agent or attorney, . . . on or before the return day of the execution.[93] The same duty devolves upon the constable By returning the money together with the execution is doubtless meant, so far as it relates to justice's executions, that he shall have it along

93. § 4868. subsec. 27, M & V.

with the execution on its return, "ready to render to the plaintiff," in the language of our court executions.[94] The plaintiff ought to be there to receive it, or he ought to apply for it before. The application at any time, and the failure of the officer to pay it might be proved. It cannot be the officer's duty to hunt him up and tender the money. It is decided, however, that the notice of the motion is application enough.[95]

If judgment is sought against the officer's sureties as well as himself, a certified copy of his bond is to be produced to show who they are, and what was the undertaking.[96]

The judgment is for the amount due on the execution, and twelve and a half per cent. damages.[97] We have sufficiently commented on the amount, the parties, the requisites and form of the judgment, and other matters in regard to these summary proceedings, when discussing the motion against the sheriff on a court execution. It is specially provided in regard to the nonreturn of a justice's execution that inability to do it on account of sickness, high water, or engagement in the execution of a precept in behalf of the State, shall be a sufficient excuse.[98]

If a debt or demand "under a magistrate's jurisdiction" is put into the hands of a sheriff, coroner, or constable for collection, and he collects it without process, he and his sureties are liable to judgment by motion for it, just as if the warrant had issued, judgment been obtained, and execution run. The judgment is to be for the amount received, with interest, and twelve and a half per cent. damages.[99]

§ 17. If a sheriff or other officer fails to execute and return *any process* issued from any court of record and

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94. § 3738, M. & V.
95 Cook *v.* Smith, 1 Yerg 148, Cannon *v* Wood, 2 Sneed, 184.
96 § 4945, M & V
97 § 4338, M. & V.
98 § 4346, M & V.
99. § 4344, M. & V.

delivered to him twenty days before the return day, he is liable to a penalty of one hundred and twenty-five dollars, to be recovered by the party aggrieved, on motion in the court to which the process is returnable. If the process issued to the sheriff of another county, the judgment, as in most if not all other cases of forfeiture, is to be a judgment *nisi,* and a *scire facias* is to issue, to give the officer a chance to appear at the next term and show cause against the judgment.[1]

MOTION AGAINST THE CLERK.

§ 18. The sheriff, we have seen, is to pay the money collected on an execution to the clerk, if not before the return paid to the parties entitled to it. Let it now be supposed he has honestly paid it into the hands of the clerk. It then becomes the clerk's duty to pay it to the persons entitled to it, and he, too, is liable to a common-law action for a failure to perform this duty. He may be ordered by the court to pay it over, and be punished for contempt if he disobeys the order The common-law processes have been deemed too slow and inefficient for these official defalcations. A creditor who has been compelled to pursue his debtor through the regular course of the common law, and has at last succeeded in wringing from him his just dues, should not be required to beat the same tedious round to rescue it from the grasp of rapacious officers The tendency of legislation has long been to afford the creditor in such cases the most summary and efficient redress.

The clerk is included in the general provisions which are made for that purpose. And particular provision is made for his defalcation. Judgment on motion is allowed against him for failing to pay over to the party entitled, on demand, money received by him on any judg-

1. §§ 4347, 4348, M. & V.

ment or execution, or paid into court on a plea of tender, or any other plea, or under an order or rule of court.[2] It is made his duty to pay over the money upon application made at his office. From this it would seem that he would not be liable to the motion upon a failure to pay over the money on a demand made anywhere else.[3]

His deputy is liable, just as he is, if he is guilty of the delinquency; that is, if the money is in his hands, and he refuses to pay it over. But the deputy's liability does not exonerate the clerk. The principal is always liable for the official acts of his deputy. If, however, judgment is obtained against him for the delinquency of his deputy, he is entitled to summary judgment against the deputy and his sureties.

Special commissioners are sometimes appointed in place of the clerk to sell property and receive funds. They, too, are liable to motion for failing to pay them over, just as he is.[4]

The clerk's official sureties are liable with him.(*a*)

No notice of the motion is required, if made at the return term of the process in the court of record, where the cause of motion is official delinquency, or within six months after the right to the motion has accrued in any other case.[5] This motion against the clerk is for official delinquency, but it can have no other connection with the return of process than that the return may have brought the money into his hands. When he has received it under a judgment, or order, or plea, there is no return term of the process in the case; still he is not entitled to notice of the motion, if it is made within six months after the right to it has accrued; that is, after demand of the money and a failure to pay it over.

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2 § 4352, M & V
3 § 4821, M & V
(*a*) § 4327, M. & V.
4 § 4354, M & V
5 § 4320, M & V.

The amount of the judgment is the sum received by him, with interest, and twelve and a half per cent. damages.[6] We suppose the damages would be calculated on the interest as well as the principal.

The only place of making the motion is the court in which he is clerk.[7]

MOTION AGAINST ATTORNEY.

§ 19. An attorney has a right to receive the money. And the express language of the law requires the sheriff and clerk to pay the money to the party entitled, his agent, or attorney.[8] The money therefore may in the regular course of the law have got safely through the hands of the sheriff and clerk into the attorney's hands. He is an officer of the court; and may be summarily ordered to pay over the money to his client, and be punished for contempt if he disobeys the order,[9] or judgment by motion may be taken against him in favor of the party aggrieved. He is to have five days' notice of the motion, if he resides or practices in the State. The judgment is to be for the amount received by him, with interest, and twelve and a half per cent. damages. The motion may be made either in the Circuit Court of the county in which he resides, or in which he collected the money. If he neither resides nor practices in the State, then he is not entitled to notice of the motion, and it may be made in the Circuit Court of any county in the State. If the money cannot be made out of him by execution, "it is the duty of the court" to strike him from the roll of attorneys, which disqualifies him to practice in the courts till he pays the debt.[10]

Upon this motion the attorney may make the same defenses that he might make were a common-law action

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6 § 4352, M & V. 7 § 4333, M. & V.
8 §§ 4821 4868, subsecs 23, 28, M & V.
9. 2 Greenl. Ev., § 147 10. §§ 4360–4363, M. & V.

brought against him for the money. Among others, he may insist upon a set-off.[11]

MOTION BY SHERIFF ON BOND OF INDEMNITY.

§ 20. The sheriff is not bound to levy on or sell property, the title to which is disputed, unless the plaintiff will give him bond and security to indemnify him against all damages and costs in consequence of the levy and sale.[12] There are other cases in which the sheriff may take bonds of indemnity, as in the case of property exempt from execution It will often be the case that the sheriff will not know whether the property is exempt or not. He may not be willing to risk the liability he will incur by a levy, and the plaintiff may be willing to give him a bond of indemnity. If he knows the property to be exempt, the bond is void, because it gives encouragement to an illegal act; but, if he is ignorant of the fact, it is valid.[13]

If in any of these cases the sheriff is sued, and judgment obtained against him for the levy and sale, he may have judgment by motion against the obligors in the bond of indemnity for the amount recovered against him, with interest. By the former law he could only have this summary remedy on bonds given to indemnify him when the title to the property was disputed; and that did not embrace the case of property exempt from execution in the hands of the defendant [14] But now this remedy on bonds of indemnity, generally, is not restricted to that given in the case of disputed title [15]

The right to the motion accrues when the judgment is rendered against the sheriff, and no notice of it is necessary, if made within the next six months. If made after that time, either five or ten days' notice is to be given, as

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11. Jones *v.* Miller, 1 Sneed, 161
12. § 3745, M & V.
13. Hunter *v* Agee, 5 Humphr 58
14. Baker *v.* Agee, 2 Humphr. 13
15. § 4349, M & V.

it may or may not be in the judicial circuit of the defendant's residence, or in another.[16]

The sheriff has the choice of three counties in which to make the motion. 1. Where the bond is given. 2. In the court from which the process issued, for the levying of which the bond was given. 3. Where any of the obligors in the bond reside. And he may make it before any court or justice having jurisdiction of the amount.[17]

The evidence to support this motion would be: 1. The production of the bond. Whether the execution of the bond would have to be proved, may be questionable. An instrument "purporting to be executed by the party sought to be charged, and constituting the foundation of an action," is conclusive evidence against such party, unless the execution thereof is denied under oath.[18] This motion is an action, and the bond of indemnity is the foundation of it; it purports to be executed by the obligors, who are the parties sought to be charged. So that it comes within the express language of the statute; and if the obligors were present to defend, or had notice to be present, they would be within the reason of it But when they had no notice, and are absent, and no opportunity therefore to deny the bond on oath, can it be the design of the statute to dispense with the proof of its execution? If the sheriff really does get a judgment against them on a forged bond, they will not be remediless; they can have it reversed on a writ of error *coram nobis*

2 The next evidence would be the record of the judgment recovered against the sheriff for the levy or sale on which he was indemnified If the motion is in the court where the judgment was obtained, the original record must be produced by the clerk; if before any other tribunal, a complete transcript of the whole record, not the judgment

16. §§ 4329, 4331, M. & V.
17 § 4350, M & V. 18. § 4525, M & V.

alone, certified by the clerk. Thus will be made out the contract, the breach, and the damages.

MOTION OF SHERIFF AGAINST HIS DEPUTY.

§ 21. When judgment has been rendered against the sheriff for the default of his deputy, he may have judgment against the deputy and his sureties for the amount of it.[19] The rule as to notice is the same as upon an indemnity bond. The motion may be made in any court or before any justice who has jurisdiction of the amount, either in the county where the bond was given, or where the judgment was rendered against the sheriff, or where the deputy or either of the sureties resides.[20] The bond of the deputy and the record of the judgment against the sheriff for the deputy's default will be the evidence to adduce in support of the motion.

MOTIONS IN FAVOR OF SURETIES AND COSURETIES, STAYERS, AND ACCOMMODATION INDORSERS.

§ 22. Whenever a judgment has been rendered against sureties, whether they have paid it off or not, they are entitled to judgment by motion against their principals for the amount recovered against them, with interest and costs. When a surety has paid off any part of the judgment against him, he may recover that part.[21]

Whether they are securities in a note or other private writing, or in a confessed judgment, or an acknowledgment of record, they are equally entitled to the motion.[22] Thus, the sheriff's or clerk's official sureties, against whom a judgment by motion is rendered, the sureties for the prosecution of a suit, or an appeal, as well as any others, may have this remedy. Is he a surety? is the question, and not, How did he become so?

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19. § 4349, M & V
20. § 4351, M & V
21. §§ 4364, 4366, M & V.
22. § 4380, M & V.

A surety may confess judgment in favor of the creditor, or let him have judgment by default, and upon that obtain judgment by motion against his principal. The principal may be in danger of insolvency, and the surety may desire to have a judgment against him speedily, so as to save himself from impending loss. He has a right to do so.[23] But, if the principal will make himself a defendant to the suit against the surety, and tender to him sufficient collateral security to indemnify him, to be approved by the court, the surety will not be permitted to confess judgment, or let it go against him by default.[24]

Whether or not the principal is a joint defendant with the surety in the judgment against him will make no difference in the right of the latter to his summary judgment against the principal.[25] If there are two or more sureties on the same debt, the motion may be joint or several at their election.[26] But, on the principle already stated, the motion must be against all the principals jointly, unless one be dead, as in the case of motions against the sureties of sheriffs.[27] If the sureties have paid off the judgment, there can be no inconvenience in allowing them either to unite or sever in their motion, as they may choose. But if they have not, there might be great inconvenience in allowing them to sever. Thus, a judgment is obtained against two of them for a thousand dollars. If they sever, each must have a judgment for the whole, which is a judgment for double "the amount of the recovery" against them, and therefore double the amount they are allowed to recover of the principal. Or each must have a judgment for half and yet the whole thousand dollars may be collected of one of them, while he has judgment over for only one-half, and the other

23. Newman *v.* Campbell, Mart. & Y. 64.
24. § 4368, M. & V.
25. § 4369, M. & V.
26. § 4365, M. & V.
27. Hall *v.* Thompkins, 9 Humphr. 592.

surety the other half, thus rendering another adjustment, and other suits, necessary.

§ 23. "A cosurety, against whom judgment has been rendered for the whole debt, or who has paid more than his ratable share of such judgment, may have judgment on motion against all the other parties to the instrument, whether included in the original judgment or not, for the ratable share of each." [28]

Stayers and accommodation indorsers are entitled to the same summary remedies against their principals as are allowed to sureties.[29]

These motions may be made in the court, or before the justice rendering the original judgment, or in any court or before any justice having cognizance of the amount, in the county where the original judgment was rendered, or in which a defendant resides [30]

Formerly, no notice was required.[31] Nor is any required now, if the motion is made within six months after the right to it has accrued [32] The right to make it accrues the moment judgment is rendered against the surety. If he does not make it on the ground of judgment, but of payment, then it accrues again upon the payment of the money. If six months elapse from this time, it would seem to be implied that five or ten days' notice would be required, as it may be in or out of the circuit of the defendant's residence.[33]

§ 24. The trial is to be by the court No question is to be submitted to the jury except one: If the fact that the plaintiff is a surety does not appear on the face of the instrument or proceedings on which judgment was rendered against him, a jury is to be immediately impaneled

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28 § 4369, M & V

29 §§ 4373, 4374, M & V.

30 Anderson *v* Binford, 2 Baxt. 314, construing §§ 4333, 4376, 4377, M & V.

31. Williams *v.* Greer, 4 Hayw 240

32. § 4329, M & V

33 § 4331, M. & V

to ascertain it.[34] In official bonds it always appears; it would rarely fail to appear in any proceedings of record. But notes are often signed by sureties without the precaution of adding the word "security" to their names. Then a jury will be necessary; and the surety should be prepared with evidence to show that he is surety, before he makes his motion. So, if a surety makes the motion against a cosurety, he must show that they were both sureties, and it must be found by a jury, if it does not appear on the face of the papers.[35]

On the trial of the motion, the plaintiff must produce the instrument creating the suretyship, or a certified copy thereof, and a copy of the record, showing the recovery of judgment against him.[36] In harmony with the common-law rule, where the motion is in the same court in which judgment was rendered, the oiriginal record may be produced There can be no use for a copy except where the motion is in some other tribunal.[37]

If the motion is upon the ground of payment or part payment, that fact, in addition to the record and the proof of suretyship, where necessary, must be shown.

The defendant may appear and make any legal defenses to the motion He may show that he has paid off the original judgment; that he had given the plaintiff property or money to pay it; or whatever other fact may disprove his right to recover. And if the original judgment was against the surety alone, and the principal had no notice of the suit, he may make any defense which he might have made against the original action.[38]

§ 25. As to the certainty and form of the motion and judgment, the reader is referred to what has already been said in regard to motions and judgments against the sheriff. The requirements of the law are the same in both

34 § 4367, M & V
35 § 4372, M & V
36 § 4375, M & V.
37. 1 Greenl Ev, § 502
38 Williams v Greer, *supra*

cases. The motion must show all the facts necessary to sustain the judgment.[39] The following form is submitted:

Motion and Judgment.

James Hart
v
John Smith.

On motion of the plaintiff, it appearing to the court that the plaintiff and the defendant, on the day of ..., 1887, made their note to one John Den, payable one year after the date thereof, on the face of which it appears that the plaintiff was the defendant's surety (or, in which the plaintiff alleges he was the surety of the defendant, but that fact not appearing on the face of the note, there came a jury of good and lawful men, to wit, A, B, C., etc, who, being elected, tried, and sworn the truth to speak upon the question of the plaintiff's suretyship, upon their oath do say he was the defendant's surety in said note), it appearing further, that on the day of , 1887, the said John Den obtained judgment in the Circuit Court of Wilson county on said note against the plaintiff (or, against the plaintiff and defendant) for the sum of one thousand and sixty dollars and also the costs of suit, which amount to fifty dollars. It is therefore considered by the court that the plaintiff recover of the defendant the said sum of one thousand and sixty dollars, and . . . dollars, the interest thereon, and fifty dollars, the costs aforesaid, and also the costs of this motion.

SETTING ASIDE SATISFACTION, AND SUBSTITUTION.

§ 26. When property is sold and the money returned, the indorsement on the execution and execution docket will show the judgment satisfied to the extent of the money made, and no further execution could be had for the amount thus satisfied. It may turn out that the property sold did not belong to the defendant, and the owner may sue the plaintiff and recover the value of it. In such case the plaintiff, on affidavit of these facts, may have a *scire facias* against the defendant to appear and show cause why another execution should not issue for the amount satisfied by the sale of the property. And if the facts are proved on the *scire facias,* another *fi. fa.* will be ordered.[40] In most cases the suit will be brought and

39 McNairy *v* Eastman, 10 Yerg. 310.
40. §§ 3705, 3706, 3712, M. & V.

recovery had against the sheriff by the owner of the property. If the sheriff has taken a bond of indemnity from the plaintiff, his remedy will be a judgment by motion against the plaintiff on the bond. In that case, too, the plaintiff may have a new execution on *scire facias*. If the sheriff has taken no indemnity bond, he is substituted to the rights of the plaintiff, and may have the *scire facias* and execution in his name.[41] The purchaser of the property at sheriff's sale may be the party sued by the owner, and upon recovery against him he is substituted to the plaintiff's right to the execution, and upon *sci. fa.* the satisfaction of the judgment will be set aside in his favor.[42]

WRIT OF RESTITUTION.

§ 27. It will sometimes happen that a sheriff has levied on personal property when the execution is superseded; and it is a question in the common-law books what he is to do with it. If he levies after the *supersedeas* issues, though he had no notice of it, he is to restore it to the defendant. If he has levied before, some authorities say the execution shall proceed; others say the levy is discharged and the property shall be returned to the defendant The opinion in Tennessee is with the latter authorities.[43] If the sheriff has made the money, but has not paid it over to the plaintiff, the defendant might have restitution upon *scire facias* at common law.[44] But as the execution is returned with us, and the record shows the fact, he would be entitled to a writ of restitution without a *scire facias*. He would, if he chose, be entitled to a motion against the sheriff and his sureties for the money.[45] If the money has been paid to the plaintiff, then upon the

41. § 3709, M & V. 42. § 3712, M & V.
43. McCamy *v.* Lawson, 3 Head, 258, Fry *v* Manlove, 1 Baxt. 257. The *supersedeas*, however, does not have the effect to discharge the levy on land or release the lien thereof. Littleton *v.* Yost, 3 Lea, 267.
44. Tidd Pr 1033. 45. § 4339, M & V

reversal of the judgment the defendant is entitled to a writ of restitution.[46] The court would award the writ on his motion; as the record, the return of the sheriff on the execution, and the execution docket, would show that the plaintiff had received the money. If it is still in the hands of the clerk, the court will order him to restore it. In Bingham *v* Brewer the court say that a judgment cannot be given against the plaintiff for the restitution of the money on the reversal of the judgment on a writ of error *coram nobis*.[47] All that they regularly adjudge is the reversal; but on motion they would *award* a writ of restitution. Whatever property has been levied on and not sold would be restored to the defendant by writ of restitution. But the purchasers of property sold will have a good title to it, the defendant being only entitled to the proceeds.

QUASHING EXECUTION.

§ 28. If the judgment be void, the execution issued on it may be quashed on motion in the court from which it issued.[48] So if the execution is not warranted by the judgment. Executions must pursue the judgment. They must be in favor of and against the same parties, and for the same amount, and be adapted to the object of an execution, that is, to carry the judgment into effect.

Where the judgment has been satisfied, the ancient common-law remedy was the writ of *audita querela* But that has become obsolete, and the remedy has long been by motion to quash the execution, either wholly, or to the extent of the payment made.[49] If there has been part payment, the execution ought to recite that fact, and if it does not, it may be quashed to that extent

46. Tidd Pr 1033.
47. 4 Sneed, 432.
48. Mabry *v* State, 9 Yerg 208
49. Barnes *v* Robinson, 4 Yerg 186, Peck, 362; 10 Yerg 254.

SUPERSEDEAS. PETITION.

§ 29. The court may not be in session while the execution is running, and satisfaction may be enforced before the motion can be made. There ought to be a process therefore to stay the execution until the motion can be made. It is said in Bacon (*Supersedeas, C*), that "if an *audita querela* be brought, founded upon matter of record or writing, the plaintiff may have a writ of *supersedeas* to stay execution, but not if it be founded on matter *in pais*" It is not so in this summary proceeding, which has taken the place of the ancient writ. Whether the satisfaction alleged be evidenced by writing or not, the defendant may petition the circuit judge for a *supersedeas*, and if the facts alleged make out a meritorious case, he will order the clerk to issue a *supersedeas* directing the sheriff to proceed no farther with the execution. The clerk issues the writ upon the defendant giving bond and security for all the costs and damages that may accrue to the plaintiff from suing out the writ. It should direct the sheriff to give notice of the proceeding to the plaintiff The sheriff desists from further proceeding with the *fi fa*, and returns it to court "stopped by *supersedeas*" The defendant makes his motion to quash it. The court, in a summary way, hears the evidence of the parties, and proceeds to quash the execution, or overrule the motion and discharge the *supersedeas*, as it may think the weight of evidence demands [50] The court may direct a feigned issue, the plaintiff stating the facts he relies on in the nature of a declaration, and the defendant answering in the form of a plea. This issue may be submitted to a jury. This course would only be taken in difficult cases at the option of the court

The *certiorari* spoken of in the cases is only used when

50 Barnes *v* Robinson, 4 Yerg 186, Peck, 362, 10 Yerg 254

the execution sought to be quashed has issued from an inferior tribunal, and is brought up to the Circuit Court to be quashed. There is no use for any process but a *supersedeas* when the *fi fa.* emanates from the Circuit Court.

SETTING OFF JUDGMENTS AGAINST EACH OTHER.

§ 30. The Code of Tennessee provides that "judgments of the same court may be set off against each other."[51] This is a well-settled principle of the common law[52] And it is not confined to judgments of the same court "A judgment in one action may be set off against a judgment in another action, though obtained in different courts."[53] A judgment obtained before a justice of the peace will be set off in the Supreme Court against a judgment obtained there[54] But to entitle a party to the benefit of the set-off he must be beneficially as well as nominally the owner of the judgment.[55] If other persons are interested by the assignment of the demand on which one of the judgments was rendered, the set-off will not be allowed[56] The jurisdiction of the court does not depend upon the statutes of set-off It is an equitable adjustment of accounts between the parties.[57]

In the last case cited it is said that the costs in one action cannot be set off against the costs in another. The costs belong beneficially to others, and not to the parties in the judgments; and for that reason it would not be equitable to allow them to be paid by way of set-off

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51. § 3635, M & V

52 Hadly *v* Hickman, 1 Yerg 502 Rutherford *v* Grabb, 5 Yerg 112 It is said in Duff *v* Wells, 7 Heisk 17, that the law of set-off is applicable to judgments only where they are founded on matters *ex contractu, sed quære*

53. Bouv Bacon, Set-off, C I ; 1 Johns 144; 3 Johns. 247, 2 Hayw. 14.

54. Ewen *v* Terry, 8 Cow. 126 55 7 Cow 480

56 8 Mass. 451. 57. 5 Yerg. 112

The set-off is applied for by the party who desires it by motion. If his judgment is for a larger amount than his adversary's, so much of it is ordered to be set off as will satisfy the other, and he is left to have his execution for the balance. If it is for a smaller amount, it is ordered to be set off as a satisfaction as far as it goes, and his adversary has execution for the balance. In either case the persons entitled to costs have a right to execution for them in the names of the parties in both judgments If the judgment proposed to be set off is in another court, a certified copy of the record will have to be produced by the party who moves the set-off.

ATTORNEY'S LIEN ON PAPERS AND JUDGMENT.

§ 31. The attorney has a lien for his fees on the papers received from his client in the course of his professional employment, and he is not bound to surrender them until he is paid He has also a lien on the judgment he recovers, and upon the proceeds if paid into his hands. But he has no lien on property, the right or title to which he has merely defended [58] The lien is not only for the fees due in the particular case, but a general lien for all that may be due him for professional services rendered his client. His lien on a judgment will not prevail against the defendant's right to set off a judgment he has against the plaintiff. It only extends to the balance due, if any, after the adjustment of the equities between the parties [59]

If the client demands his papers and the attorney insists upon his lien, and the client insists he has no right to retain them under the circumstances, the question may be decided in two ways: The client may bring an action for the papers, and the question may be made in

58 Stadiford *v.* Andrew, 12 Heisk. 664, Garner *v.* Garner, 1 Lea 29

59. 2 Kent, 641.

the pleadings; or he may resort to the more summary mode of a motion in court for an order on the attorney to deliver the papers, which order the court will refuse if it appears that he has a lien for fees. But if no such right to retain them appears, the court will compel him to deliver them. The motion should be supported by affidavits of the facts.[60] As an officer of court, he is subject like any other officer to these summary proceedings.

If he has received money on a judgment, the question of his right to retain it may arise in the same ways.

If the money is in the hands of the sheriff or clerk, the attorney may move the court for an order on the officer not to pay it over to his client until his fees are paid. He could probably move for such an order on those officers and the defendant in advance of the issuance of execution, in anticipation of its collection. It is even said he may give notice to the defendant not to pay it to the plaintiff, and if he afterward does so, he may be compelled by the attorney to pay it again to him to the extent of his fees.[61]

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60 2 Greenl Ev, § 147. 61. Tidd Pr 338.

CHAPTER XIV.

MISCELLANEOUS MATTERS OF ORIGINAL JURISDICTION.

§ 1. In this chapter a number of subjects, unconnected with each other, are collected and discussed under appropriate headings In the selection of the subjects the practical wants of the young lawyer have been considered, and those of the most frequent occurrence in practice have been chosen; and first,

ARBITRATION.

By the common law parties may submit their disputes to the decision of arbitrators, whose award is binding and conclusive on them But if one refuses to perform it, the other has to bring an action against him to enforce it.[1] If a suit is pending, the parties may agree to refer its decision to arbitrators, by a rule of the court, it being a part of the order or rule that the award of the arbitrators shall be made the judgment of the court. And then when the arbitrators, or referees, as they are often called, report their award, the court renders judgment accordingly.[2] But by the common law there was no power in the courts to make any reference to arbitrators a rule of court, and to make their award the judgment of the court, unless there was a suit pending in the court upon the matter in dispute Even if the parties submitted the matters involved in the suit to referees by rule of court, and submitted along with them other matters, agreeing that the award should be made the judgment of the court, the court could only make the award its judgment so far as it decided the matters in-

1. 3 Bl Comm 16, 2 Greenl Ev., § 79.
2. Tidd Pr 819.

volved in the suit, leaving the aggrieved party to his action on the award as to the other matters.[3]

But now the statutes generally furnish a remedy for this defect of the common law, as the Act of William III had long ago done in England, so that whether there is a suit pending or not, the parties may submit "all causes of action" to the decision of arbitrators, whose award is to be made the judgment of a court.[4] The common law is not abrogated, but added to by the statutes.[5]

REQUISITES OF THE SUBMISSION.

§ 2. 1. Under the statute it is to be by written agreement. A parol submission to arbitration is good at common law.[6] But it is not good for the purpose of having it made a rule of court where no suit is pending

2. The agreement is to specify what demands are to be submitted. It may be of some particular matters or demands, or of all demands which one party has against the other, or of all mutual demands. It must be reasonably certain as to what is submitted.

3. It is to specify the names of the arbitrators

4. It is to specify the court by which the judgment on the award is to be rendered This may be any court of record of law or equity, or, in cases within their jurisdiction, a justice of the peace court It would seem therefore that whether the matter be in itself of a legal or equitable nature, the parties might by their agreement give the jurisdiction of it either to the courts of law or equity. It would also seem that they might carry the case into any county in the State, without regard to those rules that regulate the venue of actions Similar language in regard to motions of sureties against prin-

3 Kincaid *v* Smith, 4 Humphr. 151, 7 Humphr. 28
4. § 4169 *et seq*, M & V.
5 Hallbourton *v.* Flowers, 12 Heisk 25.
6 2 Greenl Ev, § 69.

cipals received this construction in Hall *v.* Tompkins & Rutherford.[7] But that was a transitory action. The submission may be of a cause of action which is local in its nature, and then it would probably have to be carried into the court of the county where the land lies

5 The parties to the agreement may be any one having an interest, any administrator, executor, guardian, trustee, or assignee for creditors The trustee of a married woman may also be a party; but her consent has to be given either in open court and entered on the record, or by writing proved by privy examination, as in case of a conveyance of her land.[8] The right of a party in interest cannot be submitted to arbitration by a general agent, a guardian *ad litem,* or *prochein ami*[9] But an attorney-at-law may do so where suit is pending.[10]

REVOCATION OF THE SUBMISSION.

§ 3. A submission to arbitration is in its nature revocable. Jurisdiction to try the questions submitted is conferred alone by the agreement, consent of the parties; and when that consent is withdrawn, the authority of the arbitrators is gone But at the common law this right of the party to withdraw his assent, and thus defeat the arbitrament, must be exercised before the arbitrators have made their award. If the assent of any one of the parties is so withdrawn, the award of the arbitrators subsequently made is not binding, and no suit can be maintained on it; but the party revoking is liable to the action of the other for actual damages resulting from the breach of the agreement.[11] And so is the law in

7. 9 Humphr 592
8. As to the requisites of the submission see §§ 3433–3435, M. & V.
9. Haynes *v.* Wright, 4 Hayw. 63; Hannum *v* Wallace, 9 Humphr 129; Tucker *v* Dabbs, 12 Heisk 18
10. 2 Greenl Ev., § 79; 1 Pars Cont. 117, 4 Hayw. 63.
11. Tidd Pr 823, 2 Greenl Ev, § 79.

Tennessee, no change in this regard being made by the statute It is also a common-law rule, which is not changed by the statute, that the power of revocation does not exist where the submission is by rule of court, that is, where a cause pending in court is, by the judge's own order, or upon the motion and consent of the parties, referred to arbitrators under instructions to report their award to the court. The common law also allows parties upon their oral or written agreement to submit matters of difference, not pending in court, to arbitration, but it provides no rule by which the award itself can be made the judgment of a court. It left the successful party with an award in his favor, which the arbitrators could not enforce in his behalf, and upon which his only remedy was an action at law for the recovery of the sum or thing awarded. This particular defect in the common law has been remedied by statute.

Now, if the parties expressly provide upon the face of the agreement, or paper of submission, that the award shall be made the judgment of court, all legal objections out of the way, it will, upon the proper application of the party, be made such, and execution thereon ordered as in the case of other judgments in that court This provision in the agreement, however, that the award may be made the judgment of court is not irrevocable But it may be made so by the parties having the submission made a rule of court.

HOW TO BE MADE A RULE OF COURT.

§ 4. The agreement is to be produced in court; and upon proof of it, or by the consent of the parties in person or by counsel, it is to be entered in the proceedings of the court The court then acquires jurisdiction of the case, and is to make an order on the record that the parties submit to the award which shall be made in

pursuance of such agreement. It is to be entered on the docket, to be called and acted on in its order, as other cases.

There is another way of getting the case into court The court may not be in session, and the parties may desire to proceed with the arbitration, with some better assurance than their agreement that the award will be made the judgment of the court. It is therefore provided that upon proof of the agreement, or by consent of parties or their counsel, before the judge in vacation he may make the order upon the agreement that the parties shall submit to the award. And this order is to have the same force and effect as if made by the court in session. The force and effect of the order is to give the court jurisdiction of the parties and the case, as it has of any other lawsuit, regularly instituted in the court The order may be made, it appears, as well by the consent of the counsel as of the parties [12]

When the submission or agreement of the parties has thus been made a rule of court, it stands precisely upon the same footing as the case of a like rule made in a cause pending in court The court has thereby acquired jurisdiction of the parties and the subject-matter of submission for all purposes necessary to the full execution of the award when made The arbitrators, however, are not under the control of the court; they may decline to act after the rule is made, and there would be no power in court to compel them to act.

§ 5. It has been stated above that the provision in the paper of submission — namely, that the award may be made the judgment of the court — is revocable, until the submission with that provision in it has been made a rule of court It is conceded that the Tennessee statute leaves this question somewhat in doubt. The

12. §§ 4174, 4175, M & V.

question is one of construction of the statute, which does not appear to have come before the Supreme Court. The sections of M. & V. Code, which contain the law in Tennessee (4169, 4171, 4174, and 4176) are arranged from the Act of 1851–2, chap. 173.

Section 4169 does nothing more than authorize the arbitration of all causes of action whether suit be pending or not. Section 4171 requires that the submission shall be in writing, and shall contain the names of the arbitrators, and the court which is to render judgment on the award. Section 4174 says: "On proof of such an agreement, or by consent of parties in person, or by counsel, it (the agreement) shall be entered in the proceedings of the court, . . . and an order made that the parties submit to the award, which shall be made in pursuance of such agreement." Section 4176 says: "No such submission shall be revocable after the agreement is signed, *or* entered of record, without leave of the court, except by mutual consent entered of record."

The whole difficulty of construction arises from the use of the disjunctive "or" in the last section quoted. It cannot be that the legislature meant that a submission, simply signed by the parties, is irrevocable This would be in conflict with the common language of the courts and the common understanding of the profession, both before and since the enactment. And yet, such, it must be conceded, is the literal meaning of the section, if read in the disjunctive. So read, and leaving out the alternative, which would be allowable in construction, the section would stand as follows: "No such submission shall be revocable after being signed by the parties, without leave of the court, except by mutual consent entered of record." Plainly this cannot be the meaning of the act. Then what does it mean?

If read in the conjunctive by substituting "and" for "or," the meaning is not only apparent, but is consistent

with authority and reason Why bring the submission into court for proof, and a rule upon the parties binding them to their agreement, if they are already bound by their signatures to the instrument? It is not to be supposed that the legislature intended that the courts should sit in solemn judgment to determine by equally solemn orders, that which the same law declares the parties themselves have already determined Section 4176 must mean that, "No such submission (as that described in the preceding section) shall be revocable after the agreement is signed by the parties, *and* entered of record, without leave of the court, except by mutual consent entered of record" If this be the true construction of the statute, then under the common-law rule which is not abrogated, the party may withdraw his consent so as to defeat the arbitration entirely at any time before the award is published or the submission is made a rule of court; and as to the provision conferring jurisdiction on the court to render judgment on the award, he may withdraw his assent thereto at any time before the court has assumed jurisdiction in the manner pointed out by the statute, without regard to the question of award, whether it has been published or not. The proceeding is unknown at the common law, and so there is no common-law rule prohibiting him from doing so, while on the other hand, the statute, by the very terms in which it prohibits the exercise of the right *after* the rule in court is made, implies his right to do so *before;* at least it does not deny the right, and, on principle, it would exist in his favor. The effect of such a revocation would be, not to disturb the award, but to leave the party to his action on it

§ 3. The death of either party, or marriage of a *feme sole* party, before the award, is a revocation of the submission, unless it has been made a rule of court.[13] If the reference is of a matter pending in court, or the submis-

13. Moore v. Webb, 6 Heisk 301, 2 Pars. Cont. 711.

sion has been made a rule of court, the right to revive on the death or marriage of a party exists the same as in other suits [14] After the award has been made in any case, the subsequent occurrence of death or marriage does not affect the award, but it may be enforced as any other right by those to whom, under the law, the interest survives [15] The lunacy of one of the parties, before the award or rule of court, revokes the submission, and so the death of one of the arbitrators under like circumstances.[16]

TRIAL BY THE ARBITRATORS.

§ 7. The arbitrators fix the time and place of trial, unless the agreement does. All the arbitrators must have notice thereof.[17] They are also to give the parties five days' notice of the time and place.[18] They are to hear all the legal evidence offered by either party. Depositions may be taken to be used before them. Witnesses may be summoned by subpœna to be issued by the clerk of the court, as in other cases.[19] And when summoned, they are bound to attend and give evidence under all the penalties prescribed by law These penalties are a forfeiture of one hundred and twenty-five dollars for failure to attend, and commitment to jail until they testify, for refusing to testify [20] The forfeiture is enforced by *scire facias* in the Circuit Court in which the cause is pending, upon the certificate of the arbitrators on the subpœna of the witness's failure to attend [21]

The witnesses may be sworn by the arbitrators, and they are indictable for perjury if they swear falsely [22] They are then to be examined in the presence of the par-

14. Moore *v* Webb, 6 Heisk 301; 2 Pars Cont. 711
15. Moore *v* Webb, 6 Heisk 301, 2 Pars. Cont 711, Tidd Pr. 823.
16 2 Pars Cont. 711, 712
17. Mullins *v* Arnold, 4 Sneed, 262
18. § 4179, M & V
19. § 4180, M & V
20 §§ 4182, 4574, M & V.
21 §§ 4182, 4578, M & V.
22 § 4181, M & V.

ties if they require it. Arbitrators are bound by the rules of evidence which govern the courts of law.[23] The trial may be continued from day to day on the adjournment of the arbitrators, until they have fully heard the case

THE AWARD. REQUISITES.

§ 8. All the arbitrators must concur in the decision, unless the parties have agreed that a majority shall decide.[24] Where they disagree, they have no right to choose an umpire unless they derive that power from the terms of the submission, or the consent of the parties The terms of the submission may be such as that the umpire selected may decide the case himself, or that he shall become one of the arbitrators and decide in conjunction with them.[25]

The award must embrace all the matters submitted, and no more. It must be so certain that no reasonable doubt can be entertained as to its meaning. It must be possible, reasonable, final, and conclusive. If it be partial or incomplete, or wants mutuality or finality, it is void.[26]

It is to be in writing. It must be made within the time fixed in the submission, else it is void, "unless made upon a recommitment by the court." The court, however, may enlarge the time within which an award is to be made [27]

When the award is made the arbitrators have no further power over the case. They cannot reconsider and alter it.[28]

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23. Tidd Pr. 844
24. Cooley *v.* Dill, 1 Swan, 317, 2 Pars. Cont. 707.
25 4 Sneed, 262.
26. 2 Pars Cont 689-697, Gooch *v.* McKnight, 10 Humphr. 230, Conger *v* James, 2 Swan, 213
27. §§ 4177, 4183, M & V
28 Butler *v.* Boyles, 10 Humphr., 155.

FILING THE AWARD.

§ 9. If the time of filing is fixed in the submission, it must be done at that time. If the time is not so fixed, it must be filed within eight months from the time the submission is signed, unless by mutual consent the time is prolonged.[29] A time is thus fixed by law for the making of the award, where the parties have not defined it. As it must be filed in court in eight months from the signing of the agreement, it must, of course, be made within that time.

It must be delivered to the court by one of the arbitrators, or inclosed and sealed by them and transmitted to the court; and then it is not to be opened until the court orders.[30] Doubtless the court would order it at any time on motion of either party; for they should have a chance to examine it for the purpose of testing its validity by the rules of law before it is called up and acted on.

NOTICE. RECOMMITMENT REJECTION.

§ 10. It is not necessary to give notice to either party before the court disposes of the award; but when it appears necessary, the court may require notice to be given.[31] The award may be disposed of by rejection, recommitment, or adoption.[32] For legal and sufficient reasons it may be rejected. What reasons are legal and sufficient are not defined in the statute, and it is necessary to look to those rules which are established by the adjudications of the courts. If an award lack any of the requisites before named, it may be rejected. So if a mistake of law or of fact appear on the face of it, or in some writing referred to or accompanying it.[33] So if there has been

29. § 4178, M & V; Powell v. Ford, 4 Lea, 279.
30. § 4183, M & V. 31. § 4184, M & V.
32. § 4185, M & V.
33. Nance v. Thompson, 1 Sneed, 321, 2 Swan 214.

fraud, partiality, collusion, or gross misbehavior in the arbitrators.[34] So if there has been irregularity in the proceeding, such as the want of notice to the party, or some of the referees. "Every ground of relief in equity against an award is equally open in a court of law," where the reference is made by rule of court.[35]

What shall be ground of recommitment is not so well defined. Newly-discovered evidence, shown in the same way as on a motion for a new trial, has been considered sufficient.[36] So a mistake of fact or the reception of illegal evidence, appearing on the face of the award.[37] Doubtless, uncertainty, or any defect appearing on the face of it, or irregularity in the proceeding, would be sufficient for a recommittal. A rehearing, in order to have the object of the submission effectuated — a final decision of the controversy — is more consonant with the policy of the law than rejection.

It is no ground of rejection that the referees have not decided the case according to established rules of law or equity They are not bound to govern their decisions by those rules unless the terms of the submission require it But if their award clearly shows "that they intended to follow the law, and would not have made such an award if they had known what the law was," then it may be rejected [38]

MOTION TO REJECT OR RECOMMIT.

§ 11. The proper practice is, for the party objecting to the award to move its rejection or recommitment before judgment is entered upon it. A motion in arrest of judgment, after it is entered, is not appropriate nor adapted to the purpose. But as the courts are not to regard form, the motion to arrest may be treated as a mo-

34. Tidd Pr 841, Baird *v.* Crutchfield, 6 Humphr 173
35. Tidd Pr. 840, 841
36. 2 Chit 42, Tidd P. 842.
37. Jocelyn *v* Donnel, Peck, 275
38 1 Sneed, 321

tion to reject. Indeed, it is the duty of the court, at any time during the term, to set aside the judgment and reject or recommit the award, upon being satisfied that it is erroneous.[39] If the application to reject is founded on facts which do not appear on the face of the award, there must be an affidavit of the facts, which may be rebutted by counter-affidavits.[40]

ADOPTION OF THE AWARD. COSTS

§ 12. When no valid objections appear to the award, it is adopted, filed, and entered on the records, and judgment rendered in accordance with it. It is competent for the arbitrators to dispose of the costs, as an incident to their power to dispose of the controversy. They are not bound by the rule that the unsuccessful party is to pay costs; they may award that the successful party shall pay the costs, or they may divide the costs; unless the submission restricts their power in this respect But it is said that it is the costs of the suit referred, and not the costs of the reference, that they may dispose of by their award; if the submission is silent as to these, they are to be paid equally by both parties.[41] If this be so, all the costs of these references by agreement where no suit is pending would have to be paid equally by parties, unless it was agreed that they should abide the event of the submission, or that the referees might dispose of them.

Where a suit is referred, an award that one party shall pay the costs without more is a final decision against him[42] If the award is silent as to costs the successful party recovers them, and if both are successful, as we have seen is sometimes the case, each recovers costs.

Execution, or other necessary process, is awarded on the judgment, as in other cases. The parties are entitled

39. 1 Sneed, 321
40 Tidd Pr 844
41. Tidd Pr 830
42 1 Swan, 323

to appeals and writs of error as in a suit decided in the regular course of law.[43]

DISCONTINUANCE OF A SUIT BY SUBMISSION TO ARBITRATION.

§ 13. If a pending suit is, by the private agreement of the parties, submitted to arbitration, it is a withdrawal of the case from the jurisdiction of the court, and it may be pleaded to the jurisdiction at the next term But if it is a part of the agreement that the award shall be made the judgment of the court, it shall not operate as a discontinuance.[44]

AGREED CASES.

§ 14. This is another case in which the parties to a controversy may bring it before the court for adjudication without process. When a suit is regularly brought, they may agree upon the facts in the case, and submit it to the decision of the court This they could do at common law Such agreed case is equivalent to a special verdict. But by statute, where there is no suit, they may "agree upon a case containing the facts upon which the controversy depends, and submit the same to the Circuit or Chancery Court," to be decided as if a suit were pending.[45]

The same parties may enter into such agreement as may agree to submit a case to arbitration by rule of court, which, we have seen, comprehends not only those who have an interest in their own right, but also administrators, executors, trustees, and assignees for creditors

It is not expressly required that the agreement shall be in writing, but, from the nature of the case, it would have to be. It is the basis upon which rests the jurisdiction of the court, and in that respect occupies the place

43 §§ 4186, 4191, M & V
44 7 Humphr 66 9 Humphr. 142.
45. § 4187, M. & V.

of process and pleading; and should therefore be in a shape to be filed as a perpetual memorial of the right of the court to pronounce judgment in the case.

Whether the case be in its nature "of legal or equitable cognizance," it may be submitted either to the Circuit or Chancery Court Any objection to the jurisdiction on that account is waived by the agreement of submission.[46] As to the venue, it may be submitted "to the Circuit or Chancery Court of the county in which either of the parties resides, or in which a suit might have been brought to determine such controversy." If the cause of action is transitory in its nature, a suit might ordinarily have been brought in any county; if local, only in the county where the land lies. But if brought in any other county, the defendant could only have excepted to it by plea in abatement Is not the agreement of the parties as much a waiver of the objection as the not pleading in abatement would be?

AFFIDAVIT. COSTS. JUDGMENT. APPEAL.

§ 15. On presenting the agreement to the court, the parties or their attorneys must make affidavit that the controversy is a real one, and that the proceeding is in good faith to determine the rights of the parties.[47] Otherwise, men might get up fictitious cases in order to have doubtful points of law settled; or the case might really exist between others from whom the parties to the agreement might wish to purchase an interest if a doubtful question of law were settled. It is alone the existing "rights of the parties" that can be thus settled.

As no evidence is to be taken, there will be no costs but the clerk's fees and the State tax; and if they are paid in advance, no security for costs is to be given; otherwise the parties must give bond and security for

46. § 4189, M & V. 47. § 4188, M. & V.

them. All costs are to be borne equally by the parties, unless they otherwise agree.[48]

The judgment or decree is to be entered as in other cases. And either party may appeal, or have a writ of error, as in regular lawsuits.[49]

CONFESSION OF JUDGMENT.

§ 16. This is another mode introduced by statute of obtaining judgment without any regular process or pleading. A confession of judgment after action brought is a common practice. Before the commencement of a suit, or even before the cause of action accrues, authority may be given to confess judgment. If a man gives his note to another, he may at the time give also an authority to some attorney or other person to confess judgment on the note if the money is not paid when due. But this warrant of attorney contemplates the bringing of an action on which judgment is confessed. So, when an action is brought, the defendant may give a written authority, called a *cognovit actionem,* to confess judgment The confession may either be before plea or afterward on withdrawing the plea. Judgment by default is an implied confession of the action, and it is where no plea is filed, or where the plea may be treated as a nullity, the plea of *non est factum,* for instance, without being sworn to[50] The statute goes further and authorizes a debtor to confess judgment on certain writings without process[51]

THE MODE OF PROCEEDING.

§ 17. The debtor may appear in any court having jurisdiction of the amount, together with the evidence of the debt or a statement of the cause of indebtedness in writing, and there confess judgment in favor of the creditor for the amount due; or the debtor may at the time

48. § 4190, M & V
49. §§ 4190, 4191 M & V
50. Tidd Pr 545, 559, 562
51. §§ 3691, 3692, M. & V

the debt was created, or afterward, in writing, authorize any other person to do so for him. In the latter case the power must be strictly pursued, as, if the authority is to confess judgment at a particular term of court, a confession at a different term will be bad.[52]

The written evidence of the debt should be filed and constitute a part of the record of the cause,[53] but this is not essential to the validity of the judgment.[54] A judgment by confession cannot be appealed from, and after its rendition it is too late for the defendant to resort to a court of equity to set up usury or a failure of consideration.[55] A judgment confessed by the defendant in favor of the plaintiff, where suit has been instituted by the issuance of process, is not a judgment by confession, in the technical sense now being discussed, and the rules above stated have no application to such cases.[56]

In a judgment by confession no costs shall be taxed, except the clerk's fees for entering the judgment and issuing execution, if one be issued.[57] The judgment may be in the following form:

Form of Entry.

James Price
v.
John Ross

The plaintiff produced in court a note made by the defendant on the 1st day of May, 1887, for one hundred thousand dollars, payable to the plaintiff one year after the date thereof, and the defendant confesses that he owes the plaintiff on said note one hundred thousand dollars, the principal, and five thousand dollars interest, and agrees that the court render judgment against him for the same. It is therefore considered by the court that the plaintiff recover of the defendant the aforesaid sum of one hundred and five thousand dollars and the costs

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52. §§ 3691, 3692 M & V., Rankin *v.* Eakin, 3 Head, 230
53. § 3693, M & V
54. Arnold *v.* McCorkle, 6 Baxt 303, Cowan *v.* Lowry, 7 Lea, 623
55. Goff *v.* Dabbs, 4 Baxt 301; Ragsdale *v.* Gossett, 2 Lea, 729, § 3693, M & V
56. 7 Lea, 623
57. § 3693, M. & V.

If the judgment is confessed under a letter of attorney, it may be in the following form:

James Price
v.
John Ross.

Entry.

The plaintiff produced in court a note purporting and proved to have been made by the defendant on the 1st day of May, 1887, for one hundred thousand dollars, payable to the plaintiff one year after the date thereof, also a power of attorney of the same date, by which the defendant authorizes John Price to confess judgment in any court of the State in favor of the plaintiff on said note at any time after it should become due and remain unpaid, and the defendant, by the said John Price, his attorney, confesses that there is due and unpaid on said note to the plaintiff one hundred thousand dollars, the principal, and five thousand dollars, the interest thereon, and agrees that the court may render judgment against him for the same It is therefore, etc, as above

QUO WARRANTO.[58]

§ 18. When persons acted as a corporation without being legally authorized to do so, the common-law remedy was the writ of *quo warranto*, or an information in the nature of that writ. They were guilty of usurping a franchise — that is, a privilege which did not belong to the people generally, and could only be derived from the State by special grant. The same remedy applied to one who held or exercised a public office without legal authority.

If a corporation was guilty of an act or neglect which forfeited its charter, a rit of *scire facias* was the process to enforce the forfeiture if there was a legal corporate body in existence; if it was controlled by an illegal, usurping body, it might be done by the *quo warranto*.

58. This title may be considered inappropriate in Tennessee law, as in several cases it is held by the Supreme Court that neither the ancient writ of *quo warranto* nor the information in the nature thereof was ever in force in that State The statute, however, embraces all the objects obtained by the writ or the information. § 4146, M & V, 9 Humphr. 755, 1 Heisk. 461, 3 Tenn. Ch. 163.

A Court of Chancery had no jurisdiction in these cases. It might, by its injunctive powers, restrain these bodies from improper exercises of authority, it might enforce the due execution of trusts committed to them.[59]

The statute substitutes a bill in the Circuit or Chancery Court for these common-law remedies. Upon this bill, as a matter of course, the court has the power to effectuate the same ends that might have been effected by the processes for which it is substituted. We look to the common-law authorities to see upon what grounds any of those superseded remedies might be instituted, and what judgments might be pronounced upon them, and they are to be our guides as to the grounds upon which the bill may be filed and the judgment that may be pronounced upon it, except so far as the statute may have modified the common law in these respects

THE BILL. WHO PLAINTIFF. WHO FILES IT. ON WHAT AUTHORITY.

§ 19. The bill is to be filed in the name of the State, in the proper court of the county in which the office is exercised, or the corporation holds its meetings, or has its principal place of business, by the Attorney-General of that district. He has to derive the authority to file it from one of three sources· 1. The direction of the general assembly. 2 The direction of the governor and attorney-general of the State. 3. The information of any private person, called a *relator*. It is necessary to state in the bill and proceedings in the third case that it is filed on the information of the individual who is the relator, thus: "The State of Tennessee, on the information of A. B, relator, represents to the court" [60]

59. State v Merch Ins. Co, 8 Humphr 235.

60. §§ 4146, 4148–4151, M & V In Tennessee the Circuit and Chancery Courts have concurrent jurisdiction of the proceeding §§ 4146, 4148–4151, M. & V.

GROUNDS OF THE BILL.

§ 20. The bill is to set forth briefly and without technical forms the grounds upon which the suit is instituted There are five classes of delinquents: 1. Public officers. 2 Corporation officers. 3. Usurpers of any franchise. 4. Corporations. 5. Trustees. These are the defendants, and their delinquencies, which constitute the grounds of the bill, are:

1. Usurpation. This applies to the first four delinquents It consists in unlawfully holding or exercising a public or corporation office, or a franchise, or the powers of a corporation.

2. Acts or omissions which amount to forfeiture. This applies to public and corporate officers, corporations, and trustees of funds given for a public or charitable purpose. It implies that they are no usurpers, but are lawfully invested with their official, corporate or trust powers, and have forfeited them by positive willful abuse or neglect. The action lies, says the statute, against a "public officer who does or suffers to be done any act which works a forfeiture of his office;" against a corporation which does or admits acts "which amount to a forfeiture of its rights and privileges as a corporation;" also "to bring . . . officers of a corporation, or trustees of funds given for a public or charitable purpose, to an account," and "to remove such officers or trustees for misconduct" So that these latter, as well as officers and corporations, may be guilty of such misconduct as amounts to a forfeiture of their powers. To ascertain what acts or omissions will amount to a forfeiture or surrender of corporate or official franchises, we must resort to the common law.[61] That the act or neglect must be in willful violation of law is settled.[62]

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61. Bacon, Offices, M. N. 62. 8 Humphr. 235

3. "The exercises of powers not conferred by law, or the failure to exercise powers conferred by law and essential to the corporate existence." This applies to corporations, and they may or may not amount to a forfeiture. The mismanagement and improper disposition of property committed to their care is a delinquency in trustees, and in "the directors, managers, and officers of a corporation," for which they may be called to account by this bill. "Malversation, peculation, and waste" are specifications of improper conduct in them. Some of these delinquencies would demand their removal from power. Others would be corrected by such suitable restrictions and adjustments as would secure the end in view, a "faithful performance of duty."

When the action is against the usurper of an office, the name of the person rightfully entitled to it and a statement of his right may be added to the other statements, and the trial should be so managed, if practicable, as to determine his right as well as the defendant's.[63] And when several claim the office or franchise, they may all be made defendants, so as to have their respective rights determined.[64]

HOW THE SUIT IS CONDUCTED.

§ 21. It is to be conducted as other suits in equity. It commences therefore by filing the bill with the clerk. If it is brought at the instance of a relator, he has to give security for costs. The State gives no security in the other cases. The clerk then issues a subpœna to answer and copy of the bill for the defendant. The subpœna is served as in an ordinary case, and the copy of the bill delivered to defendant The defendant is to appear and defend, or the bill is taken for confessed. Usually the defense is by answer, which may comprehend a de-

63. § 4156, M. & V. 64. § 4159, M. & V.

murrer or plea, on any account except jurisdiction. The answer is an end of the pleading. There is no replication or further pleading to form an issue as in law cases. The testimony of witnesses is taken in writing, or, in other words, in depositions, and not *viva voce,* in open court, as in common-law cases. The trial is regularly by the court without a jury, but either party has a right to demand a jury to try and determine any material fact in dispute Then the common-law method must be adopted by the parties, of forming an issue on the disputed fact, one affirming and the other denying This issue is to be made up by them under the direction of the court. All the facts in the case required to be tried by a jury are to be submitted to one jury. The jury is to be summoned instanter, and the trial takes place at the first term The trial is conducted as other jury trials at law. The personal attendance of witnesses may be had, and the trial is to be upon the like evidence as a suit at law, but the court may in addition order that the bill, answers, depositions, and other proceedings in the cause be read, or such parts of them as it may deem proper. The verdict is to have the same force and effect, and the court has the same power over it, as on trials at law It is therefore the same as the trial at law, which we have heretofore discussed in our regular history of a lawsuit

In the progress of the cause, the court has power to make all such orders and issue all such extraordinary process, according to chancery practice, as may be necessary to accomplish the objects had in view.

JUDGMENT.

§ 22. If the bill is for usurpation of an office or franchise, the defendant is to be excluded from the usurped office or franchise, and pay the costs. If it is found that the corporation has forfeited its corporate

rights, it is to be dissolved, and it, or its managers or directors, are to pay the costs. The effect of a dissolution at common law was, that all debts due from or to the corporation were extinguished, its personal property escheated to the State, and its land reverted to the grantor. The statute corrects this injustice by providing that a receiver be appointed to collect the debts, dispose of the property, and distribute the proceeds among the creditors and others entitled to them, which would ordinarily be the individual stockholders.

Judgments in the other cases of delinquency would be to enjoin the exercise of illegal powers; to remove trustees and appoint others; to prevent malversation, peculation, and waste; to secure charity funds for their intended use; "and generally to compel the faithful performance of duty" by the exercise of legal powers

If any claimant to an office is brought into the bill, and it is determined in favor of his right, he has judgment for the documents of the office, that the wrongful incumbent be displaced, and he proceeds to exercise its functions.

The court may issue writs of execution, sequestration, attachment, mandamus, injunction, and all the processes known to a court of law or chancery, to carry its judgments into effect.[65]

MANDAMUS.

§ 23. Where officers, corporations, courts, or persons refuse to do what they are legally bound to do, and the person aggrieved has no other adequate specific remedy he may obtain a writ of mandamus from the Circuit or Chancery Court to compel them to do it.[66] By the party aggrieved is not only meant one whose peculiar indi-

65. See, generally, §§ 4146–4168, M & V., on the practice, §§ 5055–5071, on trial of issue by jury, §§ 5215–5220

66. § 5043, M. & V.; Hawkins *v.* Kercheval, 10 Lea, 535

vidual rights are affected, but one who has an interest in common with the public in the performance of the act. Thus the inhabitant of a town has such an interest in its government that he may apply for the writ to compel the corporate authorities to do their duty as its governors As illustrations of the principles of the law of this writ, we will barely allude to the following cases in which it lies: To compel a corporation to elect officers; to compel one elected to accept the office; to compel a corporation to admit one to an office to which he is elected; also to admit one to membership who has entitled himself to it by complying with the legal requirements So any body or functionary intrusted with the power of inauguration, may be compelled to admit a duly elected officer to his place, if he complies with the legal prerequisites When an officer is improperly removed, he may obtain his restoration by the same process. It lies to compel an officer to allow an inspection of his records, and to give certified copies of them. To compel a corporate or public officer to deliver the body and papers of his office to his successor, and the executor of a deceased officer to surrender them to the proper keeper of them. To compel a railroad company to finish or repair their road in proper cases.[67]

HOW THE WRIT IS OBTAINED.

§ 24. By the common law, the first step was a motion for a rule on the defendant to show cause why a mandamus should not issue. This motion is supported by affidavits stating particularly the plaintiff's right to have the act done, and the defendant's obligation to do it. They must also state a specific demand to do the thing, and a direct refusal If a sufficient case is thus made out, the rule is granted and served on the defendant, and

67. Field Corp 500, Peck, 291, 3 Humphr. 233.

he appears to answer the rule, whereupon, if good cause appears for the writ, an alternative mandamus issues, commanding the defendant to do the thing, or show cause by his return why he should not do it. The rule is to be served on all who are interested in the defense. Sometimes this alternative mandamus issues on the motion and affidavits, without any rule. This is the case where notice of the intended motion is given to the defendant and others interested with him, and they appear and defend. Upon the return of the alternative mandamus, if good cause is not shown why the defendant should not do the act, a *peremptory* mandamus issues, commanding him absolutely to do it.[68]

There is nothing prohibiting this circuitous practice. But a more direct and shorter way to the end in view is now prescribed by statute.

The first step in this practice is a petition addressed to the Circuit or Chancery Court, supported by affidavit. This petition comes in lieu of the motion and affidavits at common law, and is to present the right of the petitioner and the obligation of the defendant as fully as they have to be presented in the affidavits to support the motion. Upon this petition, if it states sufficient grounds for the application, the judge orders the clerk of his court to issue an alternative mandamus.

If the petition is presented in open court, the order is entered on the records as all other orders are. If presented to the judge out of court, he writes the order, or fiat, as it is called, on the petition, directing the clerk to issue the writ, thus:

To the Clerk of the Circuit Court of Wilson County:

Issue an alternative mandamus according to the prayer of the within petition on the petitioner's giving bond and security for costs. Dec 12, 1887.

W. H. WILLIAMSON,
Judge, etc.

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68. Ang & A Corp, Mandamus; Field Corp 499.

The fiat may be more special in its directions to the clerk, where the judge deems it necessary on account of the statements in the petition.

It is not said in the statute upon this particular subject that the applicant shall give security for costs But upon the general subject of costs, it is provided: *First.* That no leading process shall issue from any of the courts without security being given for costs. *Secondly.* That in any action commenced by petition or motion, the plaintiff may be required to give security Under this latter section, supplying the ellipsis with the words "for costs," the judges, doubtless, will in most, if not all cases, require security to be given for costs as a condition upon which the writ of mandamus shall issue.[69]

ALTERNATIVE MANDAMUS. REQUISITES.

§ 25. Under the order the clerk will issue an alternative mandamus It runs, like all other writs, in the name of the State. Instead of being addressed to the sheriff, it is directed to the person who is to do the act desired. If a corporation is defendant, and the act or a part of it is to be done by the whole corporation, it should be directed to it by its corporate name. If the act is to be done by a select body, as a board of directors, it may be directed to them or the whole corporation. It is to be tested like other writs on the first day of the term preceding its issuance. It must state the right of the applicant and the default of the defendant, and must be reasonably certain as to the duty to be performed The facts upon which the petitioner, called the *relator,* relies for relief, must be set forth in the writ clearly and distinctly, so that they may be admitted or traversed. It stands in the place of a declaration; it has to be pleaded to, and must possess the qualities of pleading. The clerk will embody in it the

69. §§ 3907, 3909, M. & V.

facts stated in the petition, and the command will be according to its prayer, unless restricted by the fiat.

It is to be made returnable to the Circuit or Chancery Court. If land is the subject of controversy, it is to be the court of the county where the land lies In all other cases the court of the county in which the defendant resides; if against an officer or a corporation, where the office is kept, or the corporation does its business.

It may be made returnable immediately, or at any specified time. The case may be such as to demand prompt action to prevent the mischief, or it may admit of the ordinary delays of a lawsuit. The judge will regulate the matter in his fiat. It is served on the defendant; and it must be by delivering it to him, for he is to return it himself at the time and place appointed. The sheriff is the officer to serve it, and he proves the service, if necessary, by affidavit; and this may become necessary, either for the purpose of compelling the defendant by attachment to return it, or for the purpose of taking the petition for confessed.

The defendant must give notice to any third person interested in the matter If there appears to be a third person interested who is a "nonresident or unknown," publication shall be made as in other cases to give him notice.[70]

THE RETURN OR ANSWER.

§ 26. The writ is returned by bringing it into court with whatever answer the defendant may have to make to it What is called his answer in the Code is called his return in the common-law books. It has to possess all the qualities of pleading. "It must positively and expressly assert, deny, or answer all facts in their full extent, the assertion, denial, or avoidance of which may be necessary for justification or defense" It must state

70. §§ 4311–4318, M. & V.

facts, not conclusions of law; must not be argumentative, and must be reasonably certain.[71]

At common law the return was conclusive as to the facts. However false it might be, the petitioner or relator could not deny it, but might bring an action on the case against the defendant for a false return, and if he succeeded, the court might grant a peremptory mandamus on the verdict and judgment.[72] This was altered by the statute of 9 Anne in England; and the plaintiff was allowed to traverse the return, or any material part of it, or to demur to it. Since this statute a mandamus is in the nature of an action, special replication, and pleadings therein being admitted.[73] The parties demur or plead till they come to an issue or issues as in other actions. This is the course of practice in Tennessee since 1831, so far at least as that an issue on the answer may be made.[74] An issue may be said to be made on an answer when it arises out of any fact stated in the answer.

Any interested third person to whom the notice has been given by the defendant, or by publication, may, upon application, be admitted a defendant and allowed to file an answer, upon giving security for costs.[75] The terms, "show cause by answer," are borrowed from the common-law practice of making a rule on the defendant to show cause why a mandamus should not issue His answer is to show cause why a peremptory mandamus should not issue. It may show several causes "A return to a writ of mandamus need not be single, but may contain several defenses or justifications." But if the causes are inconsistent, the answer is insufficient, "for, taken as a whole, it is false"[76] The alternative mandamus, being in the nature of a declaration, may be demurred to; but the same end might be obtained by moving to dismiss the petition.

71. Ang & A Corp. 721.
72. Bacon, Man M
73. Bacon, Man M
74. § 4313, M & V
75. § 4314, M. & V.
76. Ang & A Corp 721

The answer may also be demurred to, either *in toto*, or, as to any distinct defense it presents, so as not to involve the parties in the expense of preparing evidence in regard to it.

DEFAULT. TRIAL. JUDGMENT.

§ 27. If the defendant (or the interested party notified by him or by publication) fails to appear and answer, the petition is taken for confessed, and a peremptory mandamus awarded. Upon demurrers from either party, the ordinary judgments upon overruling or sustaining them are rendered

If an issue of fact arises from the pleading, it may be tried by the court, or submitted to a jury.[77] When it is to be tried is not stated; this is left to the discretion of the court; an emergency might require immediate trial, or the absence of it justify a continuance to the next term.

If the issues are decided for the plaintiff, the judgment is, that a peremptory mandamus issue forthwith. This writ commands the defendant to do the act, and return the writ accordingly. If the decision is against the petitioner, the judgment is, that his petition be dismissed, and that he pay the costs. Under the general rule, that the unsuccessful party shall pay the costs, they would be awarded against the defendant when the decision was against him.[78]

HABEAS CORPUS.

§ 28. Any person who is restrained of his liberty may have this writ to remove the restraint, if it should appear to be illegal.(*a*) Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever be the manner in which the restraint is effected. Words may constitute

77. § 4315, M & V.
78. §§ 4312, 4317, M. & V.
(*a*) § 4470, M. & V.

an imprisonment if they impose a restraint upon the person, and he be accordingly restrained and submits.[79]

One who is in jail or in custody of an officer may have a *habeas corpus* to try the legality of his imprisonment, the truth of the charge upon which he is committed, or his right to bail. A father may have it to obtain the custody of his legitimate children when they are improperly detained from him. But the court or judge will not, as a matter of course, restore them to him; it might be against the choice or manifest interest of the child.[80] A wife may have the writ to be released from illegal restraint imposed by her husband.[81] The husband is entitled to it to obtain the custody of his wife, except where he may have forfeited his right by improper treatment.[82] A guardian may have it for his ward.[83] But a master cannot for his apprentice who is voluntarily in the service of another.[84]

Persons imprisoned by process from a court of the United States, or a judge thereof, in cases where, by the Federal laws or by the commencement of a suit, such court or judge has exclusive jurisdiction, are not entitled to the writ.[85]

HOW THE HABEAS CORPUS IS OBTAINED.

§ 29. It is obtained by petition.[86] As it may be granted by any circuit, common law, or criminal court, or the judge thereof, or by any chancellor, in cases of equitable cognizance,[87] the petition may be addressed to any one of them. It is to be signed by the petitioner or

79. 2 Kent Comm. 26, and note b.
80. 2 Kent Comm. 195.
81. Lady Leigh's Case, 2 Lev. 128, Bacon *Hab. Corp.*, B. 3.
82. U. S. *v.* Anderson, Cooke, 143.
83. U. S. *v.* Anderson, Cooke, 143.
84. Lea *v.* White, 4 Sneed, 73.
85. § 4471, M. & V., 13 Wall. 397.
86. § 4472, M. & V., 3 Bl. Comm. 131, 133.
87. §§ 4473, 4474, M. & V.

some one in his behalf, and verified by affidavit. It must state the illegal restraint, by whom, where, and by what pretense; and if it is by legal process, a copy of it must be annexed, or a reason given for its absence, that the legality of the restraint has not been adjudged on a prior *habeas corpus*, and that this is the first application, or if not, a copy of the former proceeding must be produced, or its absence accounted for.[88] If the writ is refused, the reasons must be indorsed on or appended to the petition.[89] It is to be acted on instantly, and a wrongful and willful refusal to grant it is a misdemeanor in office, besides subjecting the judge to an action for damages.[90]

If it appears from the petition that the plaintiff is entitled to relief, the judge issues the writ, signing it himself, unless it is granted in open court, and then he orders the clerk to do it.[91] This was always the practice in Tennessee, but in England the clerk issued it on a fiat of the judge.[92]

The petition is usually in the name of the imprisoned party, but the father in his own name may petition for the release of his minor child, and the husband for his wife; in which case he is called a *relator*. Indeed, the petitioner is always called a relator, the strict legal style of the case being in the name of the State; it is the State on the relation of a citizen inquiring into the cause of his imprisonment. This is matter of form.

The following sufficiently illustrates the form of a petition:

To the Hon. W. H. Williamson, Judge of the Circuit Court.

Your petitioner, A. B., represents that he is illegally held in prison in the jail of Wilson county, Tennessee, by C. D., the jailer, by virtue of a *mittimus* directed to him on the ____ day of ____, by

88. § 4475, M. & V.
89. § 4476, M. & V.
90. § 4479, M. & V.
91. § 4478, M. & V.
92. 3 Bl. Comm. 131.

E F, a justice of the peace for said county, on a false charge of the murder of G. H

Your petitioner is unable to furnish a copy of the *mittimus*, the same being in the possession of the said C D

The legality of petitioner's imprisonment has not been adjudged in any other proceeding, and this is the first application for a writ of *habeas corpus* in this case.

Your petitioner prays your honor to grant him a writ of *habeas corpus*, and that he be released from imprisonment A B.

Sworn to and subscribed before me, this December 22, 1887

W. H WILLIAMSON,
Judge.

There is one case in which the judge may issue, or order the clerk to issue, the writ without application; and that is, whenever, in the course of any judicial proceeding, it appears from the evidence that any person is imprisoned or restrained of his liberty within his jurisdiction.[93]

DIRECTION AND SERVICE OF THE HABEAS CORPUS.

§ 30. It is to be directed to the person who is charged with holding the plaintiff in imprisonment.[94] It should be directed to the jailer who holds one in jail. It may be directed to any one who is a party to the wrongful imprisonment.[95] A misdirection or any defect in form, or misdescription of the parties, does not vitiate it, or justify disobedience to its mandate, if enough is stated to show the meaning and intent He upon whom it is served is presumed to be the person intended.[96]

It may be served by the sheriff, coroner, or constable, or any other person appointed by the court or judge It is served by leaving a copy with the defendant, and making the return on the original.[97]

§ 31. The design of the writ is to secure the forthcoming of the plaintiff to have a fair trial of the legality

93. § 4480, M. & V.
94. § 4477, M & V, 3 Bl Comm 131
95. Barry *v.* Mercein, 3 Hill, 399.
96. §§ 4491, 4492, M & V
97. §§ 4481, 4482, M & V

of his imprisonment. The law keeps that design steadily in view in its regulations in regard to the service of the writ. Although it is directed to the defendant, and he alone, according to its form, is depended on to produce the plaintiff, yet provision is made to effect the object independent of his agency and in spite of his artifices.

If the defendant is not found, or if he is, but has not the plaintiff in custody, the writ may be served on any person in whose custody the plaintiff is found. And this service on a stranger to the writ has the effect of making him a defendant.[98] If no one appears to have the custody of the plaintiff, the officer may take him into custody and return the facts together with the plaintiff.[99] If the defendant conceals himself so as to evade the service, or attempts to avoid it by refusing admittance to the officer, or to defeat the writ by attempting to carry the plaintiff out of the county or State, he may be arrested and immediately brought with the plaintiff before the court or judge.[1] By such conduct he would show that he was not to be trusted to produce the plaintiff in obedience to the writ. If the judge is satisfied, when the application is made, that the plaintiff would suffer irreparable injury before he could be relieved by the regular course of proceeding, that is, by the service of the writ on the defendant, depending on him to return it and to produce the plaintiff, he may issue a precept to the sheriff to bring the plaintiff forthwith before him. And when the evidence further shows that the defendant is guilty of a criminal offense in connection with the plaintiff's detention, the precept may further command the sheriff to arrest the defendant and bring him before the judge, along with the plaintiff. And when the defendant is thus brought up, he shall return, that is, answer the *habeas corpus* as if it had been served in the usual way; and he

98 § 4483, M. & V.
99. § 4486, M. & V.

1. §§ 4484, M. & V.

may be also examined, committed, bailed, or discharged, for the alleged offense.[2] Any attempt to elude the service or avoid the effect of the writ, by concealing the plaintiff or transferring him to the custody of another, is a high offense.[3]

RETURN OF THE HABEAS CORPUS.

§ 32. It may be made returnable to the next term of the court or before the judge who issues it, or some other judge, at any time and place appointed by him.[4] If the term of the court is at a distant period, great and oppressive injustice might be done the petitioner by postponing the return till the session of the court. The duty enjoined upon the judge, "to act upon such applications instanter," would require as speedy a return as practicable, and at a place convenient to the parties and witnesses. At the designated time and place the defendant must appear, and "make due return of the writ, and, if required, answer the petition." The petition states all the facts of the case; the writ merely states an illegal detention, as will be seen from the following form of it:

THE STATE OF TENNESSEE

To C. D (or, To the Jailer, etc., To the Sheriff, etc):

Have the body of A B, who is alleged to be unlawfully detained by you, before me (or, before the Circuit Court) at the courthouse in Lebanon, Wilson county, on the 1st day of April next (or immediately after being served with this writ) to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises

This 20th day of March, 1887.

W H WILLIAMSON,
Judge, etc

§ 33. This simple instrument is the celebrated writ of *habeas corpus*. An alleged unlawful detention is the only

2. §§ 4487–4490, M & V.
3. § 4505, M. & V.
4. § 4477, M & V.

statement it contains, and to have the plaintiff before the judge is its only command. The return to it must state —

1 Whether the defendant does detain or has detained the plaintiff, as alleged.

2. If so, by what authority and for what cause.

3. If the detention was by legal process or written instrument, a copy of it is to be annexed to the return and the original produced, if required.

4. If he has transferred the plaintiff to the custody of another person, he is to state to whom, when, for what cause and by what authority.[5]

The return is to be signed and sworn to, unless made by a sworn officer, and then it is made on his official oath.[6] Embracing, as it does, so full an explanation of his defense, it would rarely be necessary to answer the petition in addition But that may contain a statement of facts that should be responded to, and must be, if required. If, upon the face of the petition, there is no cause for a *habeas corpus,* the defendant may move to quash the writ, instead of making a return.[7]

With the return the body of the detained person is to be produced, or a good cause shown for not doing so. The cause may be sickness or infirmity, of which evidence in addition to the defendant's affidavit may be required.[8] In this case the judge may proceed as if the plaintiff were present, or adjourn to where he is, or postpone the examination to any other time or place.[9] The plaintiff may in any case waive his right to be present in writing, or his attorney may waive it, and this, of course, legalizes the examination in his absence.[10]

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5 § 4494, M & V.
6. § 4495, M & V.
7. 4 Sneed, 73
8 §§ 4496, 4497, M. & V.
9 § 4498, M & V
10. § 4503, M. & V.

PLEADINGS. TRIAL. JUDGMENT.

§ 34. At common law the truth of the return could not be controverted.[11] But a different practice has long prevailed in Tennessee, and, without any formal reply to the return, the whole facts of the case are open to investigation. The plaintiff may demur or reply to the return [12] He would demur if, admitting the facts stated. it shows no sufficient reason for his detention. He would reply if he wished to deny the facts, or to avoid them, if true, by the adduction of explanatory facts. Whether he would reply specially facts in avoidance, as in ordinary suits, or whether the pleadings would stop at a general replication, does not distinctly appear; but the statute contemplates issues to be tried. "The plaintiff may reply to the return, and all issues shall be tried by the court." It would seem that the pleadings are to evolve the issues — an idea which belongs only to the common-law course of pleading, and implies that the allegations are to be continued until there is an affirmation and denial of the material facts. But such a course is not in consonance with previous practice, or with just conceptions of such a proceeding. and is most probably not intended.

The trial is by the court or judge in a summary way, no jury, no procrastination. It may be adjourned from time to time to enable the parties to adduce their evidence, and the custody of the plaintiff secured in the meantime, as the judge may direct.[13]

The parties may and should prepare for the trial before the return of the writ. From the time of its issuance they may anticipate the issues and obtain subpœnas for witnesses, either from the judge or any justice of the peace And the witnesses are bound to attend under the

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11 Bacon, *Hab Corp*, B 11
12. § 4499, M & V 13. § 4499, M & V.

same penalties "as other witnesses," which means, we suppose, as witnesses summoned to attend the Circuit Court [14] As issues of fact are to be formed, the *onus probandi* will devolve upon the party who has the affirmative.

The judgment will vary according to the facts and the nature of the case. If no sufficient legal cause of detention is shown, the plaintiff shall be discharged [15] If a father is proceeding for his minor child, it shall be restored to him or his petition dismissed. If a prisoner prosecuted for a crime is the petitioner, he will be recommitted, bailed, or discharged If the petitioner is imprisoned by virtue of process from a judge or court of the United States, where that court or judge has exclusive jurisdiction, if he is imprisoned under sentence of a tribunal of competent jurisdiction, and the time of his detention has not expired, and in every case where the detention is legal, he is to be remanded to custody [16]

If tried at chambers the judge files the papers in his nearest court, they become records of the court, to be docketed, and execution issued for costs.[17] The costs, except in certain specified cases, are to be adjudged as the judge may think right.[18] Except where the party is held in custody for trial upon criminal charges pending, either party may prosecute an appeal or writ of error (*a*)

DIVORCE.

§ 35. The first step in a suit for divorce is the filing of a bill, either in the Circuit or Chancery Court The bill may be filed in the proper person and name of the complainant, in the county or district where the parties

14 §§ 4506–4508, M & V 15. § 4501, M & V
16 § 4511 M & V 17. § 4510, M & V
18 § 4512, M & V The student is referred to quite a learned treatise upon the writ of *habeas corpus* and the practice connected therewith in 4 Sneed (Appen) 699
(*a*) Shan. Code, § 5446, 4 Pickle, 334

resided at the time of their separation, or in which the defendant resides, or is found, if a resident; but if a non-resident, or convict, then in the county where the applicant resides. The action is transitory, and follows the person of the defendant, but the petitioner must have resided in the State for two years next preceding the filing of the petition or bill, although the acts complained of, and constituting the ground of the action, may have been committed out of the State.[19]

The bill is frequently called a petition, and the plaintiff a petitioner.

Its parts are: 1. The address 2. The name and residence of the parties. 3. The statement of the facts 4. The prayer. These are the parts of an ordinary bill in equity, and this is in the nature of an equity proceeding.[20] The rules of chancery practice apply to it, except so far as the statute has made particular regulations on this specific subject. And the same remark is applicable to those other proceedings by petition which are to follow in this chapter.[21]

The form of a petition or bill for a divorce, embracing these four parts, is here submitted:

Bill for Divorce.

To the Hon W H. Williamson, Judge, etc, holding the Circuit Court at Lebanon

Lucy Long, a Citizen of Wilson County, Petitioner,
v.
Robert Long, a Citizen of the Same County, Defendant.

Your petitioner respectfully shows to the court that she and the defendant were married in said county on the 1st day of April, 1840, and have resided there ever since. On the 10th day of August, 1886, the defendant committed adultery in said county with one Polly Harter, as petitioner is informed and believes Your petitioner is furthermore informed and believes that he has repeatedly committed acts of adultery with said Polly, both before and since that time She states further that his conduct toward

19 §§ 3308, 3309, M & V.
20. Richmond v Richmond, 10 Yerg. 345
21. § 3665, M. & V

her has been so cruel and inhuman as to render it unsafe for her to cohabit with him He has repeatedly threatened and abused her with great violence and vulgarity, calling her damned liar, bitch, strumpet, and other degrading names On the 1st day of September, 1886, or about that time, at their home, he seized her by the arms, and shook her with angry violence, and slapped her jaws, threatening still greater indignity and chastisement. The only provocation to these outrages was her earnest, but, as she thinks, not improper protestations against his incontinence maltreatment, and abandonment of conjugal duties. She therefore prays that a subpœna issue to compel the defendant to appear and answer this bill, and that the bonds of matrimony subsisting between them be dissolved, that sufficient alimony be decreed to her out of his estate, and that their infant children be committed to her.

H. CRABB,
Attorney.

Lucy Long, the petitioner in the foregoing bill, makes oath before me, S. G Stratton, clerk of the Circuit Court of Wilson county, that the facts therein stated are true, to the best of her knowledge and belief, that her complaint is not made out of levity or by collusion with the defendant, but in sincerity and truth, for the causes mentioned in the bill, and hereto subscribed her name in my presence, this 26th December, 1886.

S G STRATTON,
Clerk

LUCY LONG.

The address and the statement of the parties and their residence, together with the brief and sensible commencement, are taken from the form given by the Tennessee Code for ordinary bills in chancery.[22] The only thing worthy of note in this part of the bill is that the petitioner sues directly in her own proper name, and not by any one as her next friend. Being herself incompetent to act in law, she would have to sue by some one who was competent, as an infant does, but for statute law exempting her from that necessity[23]

§ 36. It is necessary in a divorce bill that the causes of the complaint be set forth "particularly and specially — with circumstances of time and place, with reasonable certainty."[24] A statement of the day is reasonably certain as to time; but it will often happen that the petitioner cannot be that certain, and, as the bill has to be sworn

22 § 5056, M & V
23. Hawkins *v* Hawkins, 4 Sneed, 105. 24. § 3310, M & V.

to, no greater certainty can be required than she might, with a safe conscience, be able to aver. The county is ordinarily deemed sufficient certainty of place in the law of pleading. The name of the person with whom the alleged adultery was committed is ordinarily essential to any particularity of statement, when that offense is the cause of complaint. It may happen that the name is unknown, and then by the general law of pleading that description will suffice. The offense may have been committed in a brothel with some one of its numerous inmates, whose name cannot be ascertained. The causes of divorce are very numerous in Tennessee, two of which are set forth in the above form. The statement, of course, will be varied according to the peculiar cause relied on, and the peculiar circumstances of each particular case

The prayer may be for divorce only, or, in addition, alimony, the custody of the children, and change of the petitioner's name from her matrimonial to her maiden name She may also ask an injunction to restrain the defendant from making way with his property until the suit is decided, so as to secure her alimony

The affidavit is such as is required by statute [25] The first part of it is merely to the truth of the facts stated. The second is required on account of the strong temptation to collusion between the parties to obtain a dissolution of the matrimonial bonds when they have become galling to both.

SECOND STEP. PROCESS. PUBLICATION.

§ 37. The bill is to be filed with the clerk, security given for costs, or the pauper oath taken, and then the usual process issues to secure the appearance and answer of the defendant. The clerk indorses on the bill when filed, and then issues a copy of it to be delivered to the

25. § 3311, M & V

defendant, with a subpœna to answer. This is the usual process. If any injunction, attachment, or other extraordinary process is prayed and ordered by the judge, that also issues on the required security being given.[26] The subpœna, if issued five days before court, is returnable to the next term; if issued or served within that time, it is returnable to the next term.[27] It is to be served by the sheriff's reading it to the defendant; or, if he evades that, it may be served by leaving a copy at his usual residence.[28] At the same time a copy of the petition is to be delivered to him, or left at his house whenever the subpœna may be served in that way, and the sheriff is to return that he served the subpœna and delivered a copy.

There is another way of compelling the defendant to appear, and that is by publication. This may be resorted to in the following cases:[29] 1. Where he is a nonresident of the State. 2. When he cannot be found at his usual residence, and there is just ground to believe he has left the State. 3. When the sheriff returns the summons that the defendant cannot be found. 4. When his residence is unknown. 5. When an attachment would lie against his property. 6. Where he is a convict in the penitentiary. There is another case in which publication may be resorted to in ordinary equity cases, and that is where the defendant's name is unknown.[30] If such a case could occur in regard to a divorce bill, the law would apply to it.

It requires an order for publication to authorize a resort to it. The order is made by the clerk or court. In one of the cases it is made on the return of process not found. In the others it may be made at any time after the bill is filed. In the bill, or in an affidavit, the fact

26. § 5082, M. & V.
27. §§ 5093, 5094, M. & V.
28. § 5089, M. & V.
29. §§ 3312, 5095, M. & V.
30. § 5101, M. & V.

is stated which authorizes it. Upon that the clerk makes an order or rule upon his rule docket, which may be what we have elsewhere called his appearance docket, requiring the defendant to appear at a given time, which in this case would usually be the first day of the next term, and defend the bill, or it will be taken for confessed. The clerk has a copy of this order published in a newspaper four consecutive weeks before the day appointed for the defendant's appearance. This is notice enough to him, without personal process.[31]

SECOND STEP. PRO CONFESSO. ANSWER. ISSUES.

§ 38. If the defendant does not appear and defend at the time designated, the bill is taken *pro confesso*, for confessed; it is a confession of the alleged facts There is one case where it may be taken for confessed without either publication or the service of a summons; and that is, where a woman sues for a divorce, and her bill is filed and subpœna placed in the sheriff's hands three months before it is returnable; he is to use due diligence to serve it, but if he does not serve it, the case is to be tried as if he had; and if the defendant does not appear and defend, the bill is taken for confessed.[32]

Divorce bills are usually taken for confessed, for in most cases no defense is made. But the defendant may defend, and then he answers, pleads, or demurs to the bill.[33] He may, however, incorporate in his answer every matter of defense, whether it be in its nature matter of demurrer or special plea, unless it be matter of exception to the jurisdiction of the court.[34] This being the case, and no delay being gainable by special plea or demurrer, the whole defense will usually be included in the answer.

The answer is to be filed in the first three days of the

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31 §§ 5097, 5098, 5099, M & V. 32 § 3314, M & V
33. § 3315, M & V. 34. §§ 5061, 5062, M & V.

return term of the writ, if served five days before, if the court hold so long; if not, on the first day. If served within five days of the return term, he is not bound to appear and answer till the first day of the next term.[35] It must be sworn to[36]

The following will do for a form:

The Answer of Robert Long to the Bill Filed against him by Lucy Long in the Circuit Court for Wilson County, Tennessee.

The defendant answers that (here state the facts of his defense, either denying what she states, or admitting it, and alleging new matter in avoidance, or relying on its insufficiency, and concluding). Having answered the bill, the defendant prays to be dismissed, with his costs.

WM L. BROWN,
Attorney.

STATE OF TENNESSEE, WILSON COUNTY

Robert Long makes oath before me, that the facts stated in his foregoing answer to the bill of Lucy Long are true, to the best of his knowledge and belief, and hereto subscribed his name, this 29th December, 1887.

ROBERT LONG.

JOHN DEN, *J P.*

§ 39. If the answer denies any fact stated in the bill, an issue may be made upon it to be tried by a jury, at the request of either party. Whether it admits or denies the bill, or whether he answers it at all, the plaintiff has to prove the facts as if they were denied. Even the taking of the bill *pro confesso* does not in this, as it does in other cases, supersede the necessity of proving the allegations.[37] The reason of the exception is that the temptation to get rid of the matrimonial fetters would, in most of the cases where the dissatisfaction of parties had gone so far as to lead to an application for divorce, be too strong to justify the giving of much weight to either an express or implied confession of guilt In other cases a

35. § 5093, 5094, M. & V.
36. § 3315, M. & V.
37. § 3317, M & V.

confession involves the defendant in the loss of property or other inconvenience which he would desire to avoid; and as his confession is against his interests and his wishes, it is entitled to credit.

TRIAL. WHEN. HOW.

§ 40. The trial is to be at the first term where a subpœna has been served on the defendant, and so, where it has been in the hands of the sheriff for a period of three months before the return term;[38] and in these cases it does not matter whether the defendant appears and makes defense or not — the plaintiff is entitled to his trial, subject, however, to the common rule allowing the defendant to continue on good cause shown. And so the rule is the same where the defendant is brought in by publication, and he fails to make defense at the time specified.[39] But in the case of publication where defense is made, there is no express provision as to when the trial is to take place. The ordinary chancery rule is that a bill stands for trial at the next term after the answer is filed, or after the bill is taken for confessed on overruling a plea or demurrer.[40] And it has been before stated that equity proceedings in all courts are to be conducted on the basis of the chancery practice, except where special provision may be made in particular cases.

But it would seem that that rule should give way to this consideration, that in divorce cases when the defendant appears and defends on the ordinary leading process, the service of a subpœna, the case stands for trial at the first term; and as extraordinary process is a mere substitute for it, having in view the same end — that is, to compel the defendant's appearance — when he really does appear and defend, he stands in the same place, subject

38. §§ 3313, 3314, M & V
39. §§ 5112, 5113, M & V. 40. §§ 5112, 5113, M & V

to the same proceedings, as if he had been brought in by ordinary process As he does stand in the same situation, subject to a trial at the first term, if he fails to appear, so it would seem would be the situation of the case if he does appear and answer.

The trial is to be by the court, unless one party demands a jury upon a special issue on a fact asserted in the bill and denied in the answer. Whatever may be the state of the case, the plaintiff has to prove the charges contained in the bill. The proofs on either side may be adduced either in the form of depositions or by the examination of witnesses in open court [41] As the case stands regularly for trial at the first term, and as both parties know that the allegations of the bill are to be in issue, whether denied or not, they can have their witnesses summoned or their depositions taken, without the danger that would exist in other cases, of preparing testimony to prove what may not be disputed. If either is not ready for trial, the case may be continued, as others may. And when a jury find a verdict upon an issue submitted to them, a new trial may be awarded, as in other cases.[42]

JUDGMENT OF THE COURT.

§ 41. The judgment in an equity case is commonly called a decree; but the two words are used interchangeably.

The decree is to be adapted to the nature of the case alleged and proved. There are some causes for which the plaintiff is entitled, as a matter of absolute right, to a dissolution of the bonds of matrimony, either because no valid marriage was ever contracted, or because of supervening acts or events [43] When one of these causes is the ground of complaint, and the proof sustains it, the

41. § 3320, M & V
42 § 3316, M & V. 43. § 3306, M & V.

decree must dissolve the bonds of matrimony. There are other causes for which the court, in its sound discretion, may either dissolve the marriage or decree a temporary separation, called a divorce from bed and board.[44] A dissolution of the marriage for one of the causes designated in the statute, adultery, may be prevented by the plea that the plaintiff has been guilty of the same crime, or has forgiven the defendant by receiving him into conjugal society with a knowledge of the fact, or that the plaintiff, if the husband, allowed of the wife's prostitutions, or exposed her to lewd company.[45] If the application is made by the wife on the ground of cruelty, indignity, abandonment, or neglect, it may be repelled by the allegation and proof of such misconduct on her part as justified it.[46]

ALIMONY.

§ 42. When the wife is plaintiff, and obtains a decree either of absolute dissolution or temporary or perpetual separation, she becomes entitled to alimony, or, in the language of the statute, the court may decree it to her It depends upon what kind of a divorce is granted, in what shape alimony will be allowed. If it is a mere divorce from bed and board, the legal liability of the husband to maintain the wife continues in full force. The marriage tie is unbroken She is emancipated from his dominion during the separation, but he is not exonerated from his obligation to support her; and if she survives him, she is entitled to dower in his land and her distributive share in his personal estate. To insure the fulfillment of this duty the court settles the amount of maintenance that it considers reasonable under the circumstances, and decrees that he shall pay it to her at certain designated periods. It remains a standing charge on his prop-

44. § 3307, M. & V.
45. § 3318, M. & V
46. § 3324, M & V.

erty and the income of his labors, and he cannot be discharged from it on the ground of the inadequacy of his estate or income to sustain the incumbrance It is the policy of the law to encourage a reunion of the parties by such a pressure on the delinquent as will bring him to a sense of the duties he has violated. But where the marriage tie is dissolved, and she has no longer any legal claims upon him for support, the proper course is to allow her a specific portion of his estate, instead of a periodical allowance The proportion is regulated by circumstances, and the amount of property he obtained by her is always an element, and sometimes an important one, in determining the question.[47]

It is always referred to the clerk to inquire into the amount and situation of defendant's property, and what would, under the circumstances, be a fair allowance to the plaintiff. Upon his report the court proceeds to decree what to it may seem reasonable. If the wife has obtained an attachment of his property, creditors may file their petition in the case and have their claims satisfied in preference to her alimony.[48]

EFFECT OF DIVORCE A VINCULO.

§ 43. Either party is at liberty to marry again, with the single exception that where the divorce is for adultery, the guilty party shall not, during the life of the other, marry the person with whom the offense was committed.[49] The legitimate effect upon their property would be to destroy the right that either might have upon the property of the other, which depended upon the continuance of the coverture Thus the wife's right to dower would be barred, because she must be wife at the death of the husband.[50] This relation she would not maintain, whether the divorce

47. Chenault *v.* Chenault, 5 Sneed, 248
48. McGee *v* McGee, 2 Sneed, 222, 1 Heisk. 587; 2 Heisk. 229.
49. § 3332, M & V 50 4 Kent Comm. 54

were obtained by him or her. The Code of Tennessee expressly bars any claim of hers on his estate where he obtains the divorce, while it preserves his claims on her lands and also on her personal estate, in possession or in action.[51] But this would not extend to any estate she might afterward acquire in any manner whatever; it extends only to that, the right to which is vested in her at the time of the divorce It preserves his curtesy in her real estates of which he is then seized. If the wife obtains the divorce, her right to her lands and her choses in action are restored to her, and also any personal property in her own possession acquired by her industry, by will, or otherwise.[52] It does not extend to that property of hers which had become the husband's by the marital right, and which he had reduced to possession.

DOWER.

§ 44. Dower is a widow's interest in her deceased husband's real estate. It consists of one-third of all the real estate of which he died seized and possessed, whether it was legal or equitable estate She holds it for her life, and then it reverts to the heir [53] The words "seized and possessed" do not in this case import actual occupancy or possession, but that the husband's estate is one of inheritance, and that he was at his death entitled to the possession [54] The widow is also entitled to dower in lands mortgaged, or conveyed in trust to pay debts, when the husband dies before foreclosure of the mortgage, or sale under the deed.[55] But in this case the mortgage or trust conveyance must have been made during the marital relation, for if it was made before the marriage, the rights of the creditor or mortgagee are superior to the right of

51. §§ 3329, 3330, M & V
52 § 3328, M & V
53. §§ 3244-3246, M & V.
54 Tipton *v* Davis, 5 Hayw 278 Apple *v* Apple, 1 Head, 353
55 § 3245, M & V, Tarpley *v* Gannaway, 2 Coldw 246

dower [56] The principle is, that the widow's right of dower attaches to the husband's title, on the marriage, and as that was then incumbered by the specific lien of the mortgage in favor of the creditor, so must the dower right be also. Upon the like principle the vendor's lien expressly reserved on the face of the deed is superior to dower, and this is so whether the conveyance to the husband was before the marriage or after, for in either case, at the time the inchoate right of the wife to dower attached, the title of the husband was incumbered by the lien in favor of the vendor [57] Of course after the discharge of the lien, in any case where it is superior to her right, the widow is entitled to dower in the surplus Whether the implied lien of the vendor, that is his equitable right to subject the land to the payment of the purchase money where he has made a deed to the purchaser without reserving expressly his lien, has a like effect, does not seem to be settled in Tennessee There are authorities holding that it does, and on principle it should be so held against the claim of the immediate vendee's widow [58] The widow is not endowable out of a leasehold estate,[59] nor of an estate in remainder where the husband dies before the termination of the life estate,[60] nor in lands where the seizin of the husband is only transitory, and not beneficial,[61] nor in lands purchased by the husband with the funds of his ward [62] But the husband having an estate in lands in which the wife may be endowable, a parol sale of such lands by the husband, and his death before conveyance, does not defeat her right [63] So the rights of a judgment creditor who has caused execution to be levied on the land, if the husband dies before the sale under the levy, are

56 Boyer *v* Boyer, 1 Coldw 14, 9 Heisk. 385, 9 Baxt 300.
57 Williams *v* Woods, 1 Humphr 408, Gregg *v* Jones, 5 Heisk 455, Boyd *v* Martin, 9 Heisk. 384
58. 5 Heisk 455, 456
59. 5 Hayw 278.
60. 1 Head, 349.
61. 4 Lea, 291
62. 1 Coldw 572.
63. 3 Sneed, 316

postponed to the widow's cherished claim of dower.[64] So it prevails over the husband's conveyance, made with the intent to defeat her right;[65] and even if the purchaser pays full value, but knows that the husband is selling the land to defeat the dower, the sale is fraudulent and void as to the widow.[66] The fraudulent intent of the husband, however, is the foundation of this rule, and his right to convey *bona fide*, and upon a valuable consideration, should not be unduly restricted, and even voluntary conveyances in the nature of reasonable settlements upon the children of the husband have been held good against the dower right of the widow.[67] Neither can the husband defeat the dower by will, but if he does in this way make a provision for his widow, either out of his real or personal estate, it will defeat her dower if she accepts the testamentary provision,[68] but then she has her choice whether to accept that, or take the provision the law makes for her; and the law gives her one year after the probate of the will to decide the question; if she does not within that time signify her dissent from the will in open court, it amounts to an election to take under the will. But if the provision is in personal estate, and that is afterward taken to pay the husband's debts, she may still have her dower, though the year has elapsed, and she has not signified her dissent in court.[69] The executor is bound to disclose to her, on application, the true condition of the estate, to enable her to decide advisedly.[70] And if he fraudulently misleads her, she may go into a court of equity when she discovers the fraud, and there have all the benefit she would have derived from a dissent in open court.[71]

64 1 Humphr 408, 6 Humphr 423 65. § 3254, M. & V
66. Brewery *v* Connell, 11 Humphr 501
67. Reynolds *v* Vance, 1 Heisk 348 68. § 3251, M. & V.
69. § 3251, M & V., Jarman *v* Jarman, 4 Lea, 674
70 § 3253, M & V.
71 Smart *v.* Waterhouse, 10 Yerg 95, 11 Humphr. 415, 1 Head, 112, 2 Tenn Ch. 150, 5 Humphr. 218, 293, 1 Swan, 53, 3 Sneed, 170

HOW SHE OBTAINS HER DOWER.

§ 45. It is by application to the County, Circuit, or Chancery Court of the county in which her husband last resided before his death [72] The application may be made verbally or in writing, that is, either by motion or petition. Whether it is made in one way or the other, she must first give the personal representative, if one is appointed, and the heirs or devisees who reside in the State, five days' notice in writing of the intended application. The notice may be in the following form:

To A. B, administrator, and C. D, heir (or, devisee) of E F, deceased.

I will apply to the Circuit Court of Wilson county, on the third Monday in January next, to assign me dower as the widow of the said E. F, deceased, out of his real estate This 31st December, 1887. G. H.

If any of the heirs or devisees are minors, the notice must be served on their guardians, if they have any, and also on the minors themselves. If they have no guardian, the court must act in that character.[73]

The notice may be acknowledged by the parties by written indorsement on it, or it may be served by any person, and the service proved by his affidavit before the clerk, or court, or a justice; or it may be served by the sheriff or other executive officer, and the service proved by his return [74]

No notice, either actual or by publication, need be given to nonresident heirs or devisees; but in lieu of it they are allowed three years from the date of the application to move the court for a rehearing of the cause They must give the personal representative, and the heirs or devisees resident in the State, five days' like notice of the intended

72 §§ 3255, 3259, M. & V
73 §§ 3256, M & V, Rutherford *v.* Richardson, 1 Sneed, 612.
74. § 3258, M. & V.

motion.[75] It is not expressly required, but it must be understood that the widow shall have notice of this motion, as she is the party chiefly interested Upon common law principles, she is entitled to it, it being a proceeding to set aside a decree in her favor.

APPLICATION.

§ 46. At the time specified in the notice, the application is made verbally or in writing by motion or petition The proceeding is a summary one, and has to be heard and determined at the first term. Like all other cases, it will of course be subject to a continuance, if any dispute arises, and any good cause is shown for a continuance of it. The applicant ought to be prepared to show that she is entitled to dower if it should be denied. It will usually be known beforehand whether there is to be any dispute about that or not The facts necessary to make out her title are: 1. That she was the lawful wife of the deceased 2 That the deceased resided at his death in the county in which the application is made. 3. That he died seized or possessed of the lands out of which the applicant asks an assignment of dower. The petition should not merely set up a general claim to dower out of whatever lands he did own at his death, but it ought to describe the specific lands. Like any other claim set up in a suit, the thing claimed ought to be described so as to distinguish it from other things The deceased may have owned real estates in which she is not entitled to dower. He may have owned estates for years or estates of inheritance incumbered with specific liens. The heir and the administrator ought to know out of what particular land she asks her dower, so that they may resist it as to those parcels to which it does not attach

When the application is by motion without petition, the same facts ought to appear in evidence as would be

75 § 3257, M & V

stated in a petition, if that mode were employed. They would, however, be understood as admitted on a verbal application, if not denied, just as they would if stated in a petition, and that not denied by an answer. Her title as lawful wife of the deceased, his residence in the county, and the liability of the particular lands specified to her claim, would be all admitted. If her title to dower is disputed, as if it be denied that she was the wife of the deceased, an issue may be made upon the fact and submitted to a jury, or the court may try it [76]

§ 47. If the application is by petition, it may be in the following form:

To the Worshipful Court of Wilson County:

Jane Hart, a citizen of Wilson county, petitioner,
v
James Hart and John Smith, of Wilson county, defendants

The petitioner respectfully shows to the court, that she was the wife of John Hart, who resided and died in Wilson county, on the 1st day of May, 1887, leaving the petitioner his widow, and the defendant, James Hart, his only child and heir. He died intestate, and the defendant, John Smith, is his administrator. At the time of his death the said John Hart was seized in fee of a tract of land of three hundred acres, lying on Spring creek, in District No 10, of said county, and bounded as follows: Beginning at a cedar (proceed and describe the land) Petitioner prays that dower may be assigned to her out of said land.

H CRABB,
Attorney.

The answer may be in the following form:

The Answer of James Hart and John Smith to the Petition of Jane Hart for Dower.

The defendants, for answer, say (here proceed and admit or deny the statements in the petition, and set up any new fact that may be sufficient to defeat the petition, and append an affidavit as in the answer to the divorce bill

APPOINTMENT OF COMMISSIONERS.

§ 48. If the court is satisfied from the silence of the defendants who have been notified, or their express ad-

76 London *v* London, 1 Humphr. 1, Thompson *v* Stacy, 10 Yerg. 493.

missions, or the evidence adduced, that the petitioner is entitled to her dower, they appoint commissioners to assign it. These consist of two disinterested freeholders or householders, and the county surveyor, or, if he is akin to any of the parties, some other surveyor.[77] If there are lands in any other county, the widow should make that known to the court, so that the court may direct the commissioners to take that into their consideration in laying off the dower. This order may be as follows:

Decree Appointing Commissioners to Allot Dower.

Jane Hart
v
James Hart and John Smith

On motion (or, petition) of the plaintiff, it appearing that John Hart died on the 1st day of May, 1887, seized in fee of a tract of three hundred acres of land, lying on Spring creek, in Wilson county, on which he resided at the time of his death (and also of a tract of acres, etc, etc, where there are other tracts If the proceeding is by petition, and the boundaries described, they need not be repeated in the order, if the application is verbal, the land should be described in the order), it appearing further that the plaintiff was his lawful wife and is entitled to dower in said land; it appearing also that the plaintiff had given the defendant, James Hart, the only heir of said deceased, and John Smith, his administrator, five days' notice of this application, it is therefore ordered by the court that John Long and Hiram Short, freeholders (or, householders) of said county, be appointed commissioners, in conjunction with David Stout, the county surveyor of said county, to allot and set off to the plaintiff the one-third part in value of said land for her dower, and report to the next term of this court

This entry is adapted to a case where no defense is made. It will do if the defendants actually appear and defend, but it would be more appropriate to show that they did appear, which may be done by beginning thus

On motion (or, petition) of the plaintiff, the defendants being present, it appearing, etc, as above

77. § 3259, M & V.

If the defendants have answered, the entry may begin thus:

On petition of the plaintiff and the answer of the defendants, and the proof, it appearing, etc.

And in this case it is proper to leave out of the entry the statement that notice was given the defendants, as appearance waives notice. It will not do any harm, however, to state it

ASSIGNMENT BY COMMISSIONERS.

§ 49. They are to be sworn by the surveyor to perform their duty faithfully.[78] They then proceed to examine the lands, and survey and set off to the widow one-third of them, not in quantity, but in value. If there are several tracts, whether in or out of the county, they are to take them all in the estimate, and allot to her one whole tract or parts of several tracts, as they may think justice to her may demand [79] But they cannot take into the estimate lands in an adjoining county, unless so directed in the order appointing them.[80] They are to assign to her the dwelling-house and outhouses, unless that would, under the circumstances, do injustice to the heirs, in which case they may allot her such portion thereof as will afford her a decent residence in view of her condition and past manner of life. By agreement of the widow, they may exclude the houses from her allotment, and assign to her some other part of the land If the real estate is indivisible, the assignment of dower will have to be in a peculiar manner. It may be that a mill constituted the decedent's whole estate In that case the commissioners would either assign one-third of the annual profits, or the possession and profits each third year.[81] The widow may, in any case, by the mutual consent of herself and the heirs,

78. § 3263, M & V. 79 § 2415, M & V.
80. § 3264, M & V.
81. Lewis *v* James, 8 Humphr. 527.

take an undivided third part of the estate, and where her husband was a tenant in common with others, she takes an undivided third of this undivided part [82] But in this case it is more common for the heirs to have their ancestor's part divided off to them, and then the widow has her dower out of that part set off to her by metes and bounds.

COMMISSIONERS' REPORT.

§ 50. When the commissioners have surveyed and laid off the dower, they are to make out, sign, and return to court a report in which they shall exhibit a plat of the dower, and also plainly set forth the same by metes and bounds, where the dower can be so assigned. We have just seen that there are cases where it cannot be so assigned, cases where the estate is indivisible, and where the deceased husband was a tenant in common

Any interested party may except to the report as an unfair and improper assignment of dower. If the court sustains the objection, it may decree her dower in some other mode, if the report discloses the facts sufficiently to enable it to do so. If not, it may recommit the report under instructions to the commissioners, by which the alleged error may be corrected. If the objections are overruled, or none are made, the report is confirmed, and then the clerk is to enter it in full with the plat on the records of the court It is, in other words, to be incorporated in the decree of confirmation, which may be as follows:

Dower. Final Decree.

Jane Hart
v.
James Hart and John Smith.

The commissioners appointed at the last term of this court to assign to the plaintiff her dower in the estate of John Hart, deceased, returned the following report

The undersigned, commissioners appointed at the last term of the Circuit Court of Wilson county, to allot to Jane Hart her dower out

82 Lewis *v* James, 8 Humphr. 527, 4 Kent Comm 63, 64

of the real estate of her deceased husband, John Hart, being sworn, do assign to her the following land (or, the following town-lot, etc.) lying in Wilson county, on Spring creek, District No 10, and bounded as follows Beginning at a cedar, etc (describing it), which we consider one-third in value of the real estate of the said John Hart, deceased

Given under our hands and seals this 3d day of January, 1887.

JOHN LONG,
HIRAM SHORT,
DAVID STOUT, *Surveyor.*

Which report is in all things confirmed And it is further ordered that the plaintiff pay the costs

HOMESTEAD.

§ 51. In Tennessee a homestead of the value of one thousand dollars in real estate and improvements, if any thereon, is allowed to each head of a family. It is exempt from sale under legal process during the life of such head of the family, and upon his death it shall go to his widow during her natural life, with the products thereof, for her own use and benefit, and that of her family who may reside with her, and upon her death it shall go to the minor children of the deceased husband, free from the debts of the father, mother, or said children, and upon the death of said minor child or children, or their arrival at age, the same may be sold, and the proceeds distributed amongst all the heirs-at-law of the deceased head of the family [83]

The homestead may be sold by the joint consent of husband and wife, where that relation exists The statute does not state what the power of sale may be where the relation of husband and wife does not exist; but from the language of the courts it may be inferred that the surviving husband may sell it, and thus destroy the interest of the children [84] But, on the contrary, it has been expressly held that on the death of the husband the surviv-

83. §§ 2935, 2943, M & V

84. Hicks v. Peppeer, 1 Baxt. 45, Caldwell v. Bowman, 1 Leg Rep. 21.

ing widow has no power of sale, and that her conveyance is a nullity.[85] The reason for the distinction is not very clear.

Actual occupancy of the land is not essential to the claim of homestead, and the head of the family may elect from what portion of his lands it is to be set apart to him, whether living on the same or not.[86] The right to homestead exists as well in equitable estates as legal, and it is allowed in leaseholds when such estates are for more than two years and not exceeding fifteen years.[87]

Upon the death of the head of a family without widow or children, the homestead becomes at once subject to the payment of his debts.[88] If the wife obtain a divorce from the husband on account of his fault or misconduct, the title to the homestead is to be vested by decree of the court in the wife during her life, and then to her children.[89] It has been stated above that the husband and wife jointly may convey the homestead. No special form is required in the deed Both homestead and dower may be conveyed by deed in the usual form, it is only necessary that it be a joint deed, with privy examination of the wife, without "apt words," and without special mention of either the one or the other.[90]

Homestead under the Tennessee statute is a peculiar estate, and it has required the deliberations of the courts to define it. It is said not to be an estate in lands at all, but a mere exemption of a right of occupancy and enjoyment. It is a life estate only in the husband, the widow, and the children, although as to the latter the language of the statute would, without straining its meaning, import a fee. Ultimately — that is, when the husband and wife are dead, and the children

85 Shelton *v.* Hurst, 16 Lea, 470
86. § 2936, M & V
87. §§ 2937, 2938, M. & V.
88. § 2945, M & V
89. § 2946, M & V
90. Crook *v.* Lunsford, 2 Lea, 238; Daly *v* Willis, 5 Lea, 100

are either dead or have reached their majority — the interest may be subjected to the payment of the husband's debts, upon the theory that the reversion in fee remained in him, and on his death descended to his heirs, subject to the payment of his debts. And so upon this principle it is held that the remainder or reversion may be levied upon and sold by the creditor of the husband, after the homestead has been set apart to him and in his lifetime.[91]

HOW HOMESTEAD SET APART.

§ 52. Homestead in Tennessee is a constitutional right, and exists in favor of the head of a family, whether it be formally set apart or not.[92] It is necessary, however, to set it apart in two cases: 1. Where the lands of the husband have been levied on for debt. Here the law requires the officer to set apart the homestead before proceeding with the sale. 2. Where the husband is dead, leaving a widow and minor children surviving In this case it is necessary for the same reason that requires the assignment of dower, to the end that it be protected against creditors of the estate of the decedent and the heirs-at-law. And so the statute has provided for these two modes only for setting it aside. In the first case, when the officer has levied the execution or attachment on the homestead or upon lands from which it must be set apart, it is his duty to summon three disinterested freeholders, not connected with the parties, and administer to them an oath to set apart the homestead out of the real estate so levied on. The persons thus selected are required to go upon and examine the premises They are to be controlled by the head of the family as to the particular location of the homestead — that is, he may designate on what part of the land levied on it is to be

91. Fauyer *v.* Fleenor, 13 Lea, 622· Flatt *v.* Stadler, 16 Lea, 371.
92. Const Tenn., art 11, § 11.

allotted; and this direction may include the dwelling and outhouses. If the head of the family give no direction, the commissioners are left to the exercise of their sound discretion in making the allotment. Having determined the location, it is the duty of the commissioners to set out in writing the boundaries thereof, and certify that such is the homestead set apart by them, and deliver the same to the debtor. It is also the duty of the officers to certify on the certificate of the freeholders that the same is their act and deed. The debtor may have this certificate registered in the county in which the lands lie, and when so registered it vests in the head of the family, his widow and minor children, a good and valid title to the land, exempt from execution.[93]

When the real estate levied on is of greater value than one thousand dollars, and is so situated that it cannot be divided so as to set apart the homestead, the freeholders shall certify that fact, and the officer may proceed to sell the whole tract and out of the proceeds pay to the clerk of the court, from which the process issued, one thousand dollars as the homestead fund, which under the direction of the court will be invested in a homestead for the family. Only the excess of land in the one case, or the excess of the fund in the other, can be subjected by the officer to the payment of the debt in his hands for collection.[94] The failure of the officer to perform the duty required of him in these cases does not in any way affect the rights of the parties; if he should sell the whole land without assigning homestead, the purchaser would acquire no title as against the right of homestead, that right, as before stated, being secured by the Constitution.[95]

§ 53. The manner of allotting homestead in the second case, that is, where the husband is dead, and the

93. §§ 2940, 2943, M & V. 94. §§ 2940, 2941, M. & V.
95. Gray v. Baird, 4 Lea, 213.

application is on the part of the widow and children, does not differ in any respect from the proceedings for the assignment of dower.[96] These have before been fully stated, and need not be here repeated.

§ 54. Both the Circuit and Chancery Courts have jurisdiction to assign homestead. It does not seem to be so certain as to the jurisdiction of the County Court. But it has been held that where that court has jurisdiction, on the ground of insolvency, of the settlement of estates, as an incident thereto, it has the power to assign homestead.[97] Whether it has the power, upon an original application, or in any other case than that named, may be considered doubtful.

§ 55. The widow is entitled to both dower and homestead; but in such case the commissioners shall set apart the homestead first, and then one-third of the remainder of the lands as dower. And if the real estate is so situated that both cannot be set apart in kind, then the land is to be sold, and from the proceeds one thousand dollars is first set apart and invested as homestead, and dower is assigned out of the residue.[98]

§ 56. The homestead is not exempt from the payment of a debt due for purchase money; nor from a mechanic's debt for improvements on the land; nor in favor of a guardian against the ward, where the latter's money has been used in the purchase of the land; and so in any case where the money, say of A., has been so used in the purchase of land by B as to create in the land an equity or trust, in favor of A., the homestead right of B. will not prevail against the equity of A. to have a satisfaction of his claim out of the land. But the mere fact that one lends money to another with which to purchase land does not create a debt in favor of the former

96. § 2944, M & V.
97. Rhea v. Meredith, 6 Lea, 605.
98. § 2944, M & V.

that is superior to the homestead right of the latter in the lands so purchased.[99]

§ 57. The law does not allow a homestead to both the husband and wife at the same time.[1] But it does allow it to either one. The wife may have it out of her own estate, equally as well as the husband out of his (*a*) If she should incur a debt chargeable against her separate estate, there is no reason why she should not be permitted to protect herself by a claim of homestead. But, as above stated, she cannot do so if the husband has claimed a like right, for this would result in creating two homesteads for one family — a thing not allowed If a wife have a separate estate, and she and her husband be equally bound for the payment of a debt, and each at the same time should claim the benefit of the homestead, to which would the law award it? The husband in law is regarded as the head of the family, and the courts would doubtless give him the preference.

§ 58. Who is the head of a family is another perplexing question. A single person, who has never been married, is not the head of a family; but it is said that his environment may make him one, as if he be supporting, as a part of his household, an indigent mother, brother, or sister.(*b*) A widow without children is said not to be entitled to homestead in her deceased husband's estate;(*c*) but a widower without children, who lives in his own house, and there supports his mother, is

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99. Upon the several statements of the text, see Const. Tenn., art. 11, § 11; 1 Lea, 229; 11 Lea, 155; 3 Lea, 634, Thompson Homestead, §§ 338, 341, 342; 4 Lea, 212. The collation of authority in Mr. Thompson's work shows a great variety of opinions as to what is a debt "created in the purchase of the land," and no better rule than the one stated in the text can be resolved from them

1. Tourville *v.* Pierson, 39 Ill., Gambette *v.* Brock, 41 Cal 84

(*a*) 55 Ga 182, 50 Miss 720, 22 Mich. 264, 33 Ind 83; 31 Tex 680 The wife is not so entitled in Tennessee 5 Pickle, 443.

(*b*) 41 Ga 153.

(*c*) 46 Ga 231. *Contra*, 11 Nev 260.

entitled to it (*d*) The principle in Tennessee is that the right to homestead being once acquired is not afterward lost by changes in the family, and so, being once the head of a family, and the owner of lands from which homestead may be assigned, the subsequent death of wife and children will not defeat the right of the surviving husband.[2] Husband and wife constitute a family,(*e*) and fixes the right of homestead; and, upon the principle just stated, on the death of either the survivor would be entitled to assert the right against a creditor.

It is impracticable, in a work of this character, to discuss more fully this subject. The student should look to the statutes of his own State, and for a more extended investigation should consult the work referred to in the foot-note.[3]

PARTITION.

§ 59. Those who own undivided shares in land may have it partitioned, that is, they may have the land divided, and each owner's share allotted to him by metes and bounds. If all the owners are capable of acting for themselves, they may partition the land by agreement, each conveying to the other his interest in the share allotted to him. But if they cannot agree, or if some are infants, or *femes covert,* or *non compos mentis,* they must resort to the courts. The County, Circuit and Chancery Courts have concurrent jurisdiction [4]

Whether a person has an estate of inheritance, or for life, or years, in common with others, he is entitled

(*d*) 11 Iowa, 104.
(*e*) 21 Ill 40 45.

2. Webb *v* Cowley, 5 Lea, 722

3. See the very valuable treatise of Judge Thompson on Homesteads and Exemptions, where the student will find he has industriously collected authorities, which seem to include every question that has arisen on the law of homestead The statutes of the several States differ in language, and have produced many differing judicial views, so that few general rules can be stated that are applicable alike in all the States.

4. § 3997, M. & V

to partition,[5] although the estate of the others may be of a different and distinct character.[6] It has heretofore been held in Tennessee that one who has but an undivided equitable interest in land is not entitled to partition without first going into a court of equity, and there having a decree vesting in him the legal title to the extent of his interest.[7] It is still true that where the application is made to the County or Circuit Court for partition, the petitioner must have a clear legal title to the interest claimed, as neither of those courts has jurisdiction to settle questions of title in decreeing partition.[8] In support of this rule it is said that a petition for partition is not a bill to settle title, and that a party to a proceeding for that purpose is not estopped afterward to set up title in himself against the title decreed in the partition.[9] But as to the Chancery Court the rule is otherwise, that court may entertain the application of a party having only the equitable title, and first adjusting the question of title, will proceed to decree partition.[10] The statement of the rule is that a court of law can only decree title where the legal title is settled, while a court of equity may both settle the title and decree partition in one and the same proceeding

Estates in remainder or reversion may be partitioned as well as those in possession; and so the fact that the premises are subject to a life estate by dower or curtesy, or to an incumbrance by mortgage or otherwise, will not affect the right.[11] So lands adversely held may be partitioned, but in this case the bill should be filed in the Chancery Court and the adverse claimants made defendants, for without this they would not be bound by the decree.[12]

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5. § 3993, M. & V
6. § 3995, M & V
7. 4 Humphr. 46.
8. 10 Humphr 65 4 Humphr 177
9. 4 Humphr 178
10. 7 Colo 23, 2 Heisk 490, note, 3 Head. 31
11. § 3994, M & V
12. 8 Humphr 519

MODE OF PROCEEDING.

§ 60. It is by petition or bill addressed to the court, like the bill or petition for dower or divorce mentioned in preceding sections. It is to state: 1 The names of the owners. 2. Their residence. 3. Which, if any of them, are infants, which are married women, and the names of their husbands 4. A description of the land and its situation. 5. The title by which it is held, as whether by descent or purchase, and what interest the respective parties have in it, whether an estate in fee, for life, or years. 6 Such other facts as may be deemed necessary, whether it is subject to homestead, dower, curtesy, mortgage, or other incumbrance; whether any of the various interests are contingent, or all vested. It concludes with a prayer that it be divided among the claimants according to their respective rights.[13]

Every person having an interest is to be made a party. If dower and homestead have not been allotted, the person entitled to them is to be made a party.[14] There are two ways of becoming parties: first, by uniting in the petition, and, secondly, by being made defendants. All adult parties who consent to it may join in the petition. Infants are not to be joined in the petition, but must be made defendants, so that the court may appoint a suitable person as guardian to take care of their interests.[15] If all the owners should be infants, the petition would be by their regular guardian, the infants being made defendants. The husband, where the wife is a minor, may file the petition, making the wife a defendant.[16]

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13. § 4001, M & V.
14. § 4002, M & V.
15. 5 Sneed, 189. Making infants copetitioners renders proceedings erroneous, but not void 3 Heisk. 641.
16. § 4055, M. & V.

NOTICE TO DEFENDANTS. SECURITY FOR COSTS. VENUE.

§ 61. There are three ways of giving notice to those who do not unite in the petition:

1. It may be filed with the clerk, a subpœna and a copy of the petition issued by him and served on the defendants, according to the regular course of a bill in chancery.[17]

2. Written notice may be served on the defendants, stating the time when and the court at which the petition will be presented. In this case the petition is not filed, nor a copy issued. It makes its first appearance when presented to the court at the time designated. The notice is not process, but a private communication, to be served on the defendants five days before the presentation of the petition, as in the case of application for dower.[18]

3. Whether the petitioners proceed by way of subpœna or notice, they may give notice to defendants by publication in the following cases: 1. Where they are nonresidents of the State. 2. Where they are unknown. 3. Where their residence is unknown. The clerk or court orders the publication upon affidavit of these facts.[19]

If the petitioners proceed by subpœna, they must give security for costs, as in other cases where leading process issues.[20] If they proceed by notice, they give no security, unless it is required when the petition is presented. That is the general rule in regard to all actions commenced by motion or petition.[21]

The petition may be filed in the county where the land or any of it lies, or where the defendants reside, or in any other county if the claimants all join in the petition, or assent to the partition.[22] But lands in one State cannot

17. § 4005, M. & V.
18. § 4004, M. & V
19. § 4006, M & V
20 § 3907, M. & V.
21. § 3909, M & V.
22. § 3999, M. & V.

be partitioned by proceeding in the courts of another State.[23]

ANSWER. DEFAULT. TRIAL.

§ 62. If all the parties join in the petition, there is no notice or process, and the court at once decrees the partition, and appoints three or more respectable freeholders to make it.[24] But where there are defendants, and notice is given or subpœna served, they either appear and answer, or make default. In the latter case the petition is taken for confessed, and the court decrees the partition. If they answer assenting to the partition, it is decreed. If any of them are infants, the notice or process has to be served on them, and they must answer by guardian. If they have no guardian, the court must appoint a guardian *ad litem,* by whom they are to answer. But if notice has not been given to the infant, the answer of his guardian is of no force, and the partition, as to his interest, will be erroneous. An adult party may waive the want of notice, but a guardian *ad litem* cannot.[25] The defendants may plead, answer, or demur. If the answer disputes any of the essential facts, the case takes the course of other equity cases. It stands over for evidence, and is regularly heard at the next term. Usually, however, these cases are heard and disposed of *ex parte* or by consent, at the first term.

INTERLOCUTORY DECREE.

§ 63. This decree declares the rights, titles, and interests of the parties, and that the land be partitioned among them according to their respective rights. When there are unknown parties, or their shares are unknown, the court decrees partition as far as parties and the shares they are entitled to are known, leaving the residue of the premises

23. Johnson *v.* Kimbro, 3 Head, 558.
24. § 4010, M. & V
25. 2 Swan, 197, 2 Head, 258, 1 Heisk. 729, 738

for division as soon as the parties or their shares are ascertained.[26]

There are two sorts of cases where a party may be unknown:

1. Where he has a vested interest, but his name is not ascertained For instance, it may be known that the children of A. are entitled to one-half of the land, but what their names are is not known; and it may even be unknown where they live. If notice has been given by publication, their right is declared, and their share severed, but left undivided among them until they appear and ask a division.

2. If the parties who are to take the interest are to be determined by the happening of a future event or fact, there can be no partition; as if the land be given to such of the children of A. as shall be alive at his death, there could be no partition before the death of A., for, until that occurs, the court cannot tell what children of A. will be alive or the number of shares.[27]

§ 64. The cause is heard on the petition, answer, and proof The court determines the right to partition, and appoints commissioners to carry it into execution. This is done by the interlocutory decree, which may be in the following form:

Form of Interlocutory Decree.

A, B, and C. } PARTITION. INTERLOCUTORY DECREE
v
D, E, and F }

This cause coming on to be heard on the petition taken for confessed (or, on the petition and answer, or, on the petition, answer, and proofs, as the case may be), and it appearing to the court that the petitioners and defendants are the heirs of John Den, deceased, and as such are entitled to equal shares of a tract of six hundred and forty acres of land lying in Wilson county, District No 16, and bounded as follows (describe it): It is therefore ordered that G, H, and I, freeholders of said county, divide said land into six equal parts, and allot to each of the petitioners and defendants one of said parts, and report their allotment to the next term of this court.

26. §§ 4008, 4009, M. & V. 27. 8 Humphr 328.

ALLOTMENT BY THE COMMISSIONERS.

§ 65. The commissioners are to be sworn, and they may employ a surveyor and other necessary assistants. They are then to divide the land and allot to the parties their respective shares, as decreed by the court, designating them by "posts, stones, marked trees, or other permanent monuments." In the allotment of the shares they are to look to equality of value instead of quantity, and when the commissioners are satisfied that exact partition cannot be made without injury to all or some of the parties, they may make as near an approximation to it as practicable, and equalize the division by charging the more valuable shares with the payment of money to the less valuable, and report the facts.[28]

REPORT. FINAL DECREE.

§ 66. When the commissioners have divided the land according to the interlocutory decree, they are to make their report in writing, signed by at least three of them, showing the allotments they have made, and describing the lot of each party by metes and bounds, or other sufficient designation. To this report, any party who thinks himself injured by the division may except. He should file his exceptions, and they will be examined and sustained or overruled. If sustained, the report may be corrected by the court if it discloses the facts that are necessary to the correction. If not, it will have to be recommitted to the commissioners

If the report is not excepted to, it will be confirmed by decree of the court, and the title which all have in the share allotted to each one will be divested out of them and vested in him The court will further decree that the owners of the larger shares shall pay to the owners of the

28. §§ 4012–4014, M & V

smaller ones the amounts respectively charged upon them by the commissioners. This charge is a lien upon the share till paid. If an infant's share is thus charged, the court shall direct it to be paid out of his personal estate, if any. If he has none, it must be a charge on his lot.

The costs are to be decreed against each party equally, or in the proportion of their interests, as the court may direct.[29]

This is the final decree: it embodies the report of the commissioners, and a copy of it may be, if it must not be, registered on the books of the county register. It may be in this form:

A., B., and C.
v.
D., E., and F.

Partition. Final Decree.

This cause came on to be finally heard on the report of the commissioners, which is as follows:

The undersigned, commissioners appointed by the Circuit Court of Wilson county, at the September term, 1887, to partition between A., B., C., D., E., and F., heirs of John Den, deceased, a tract of six hundred and forty acres of land, lying in Wilson county, etc. (describe it as in the interlocutory order), respectfully report that they have divided and allotted said land as follows: To A., they have allotted the following parcel, containing one hundred acres, to wit: Beginning at a hickory at the northwest corner of said 640 acre tract, and running east 200 poles, etc. (describing the boundaries fully. To B., they have allotted, etc. (so go through with each lot) The undersigned were satisfied that they could not, without serious injury to the parties, make the allotments of exactly equal value. They consider the share allotted to A. worth one hundred dollars more than B.'s share, and they charge A.'s share with the payment of that amount to B.

All which is respectfully submitted G., H., I.

Which report is in all things confirmed by the court; and it is decreed that the title of the parties to the share of each as allotted in said report, be divested out of them and vested in each respectively to the particular share so allotted to him. It is further decreed that A. pay B. one hundred dollars to equalize their shares, and that the same remain a lien on his share until paid. It is decreed further that each of the parties pay an equal share of the costs; for which let execution issue.

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29. §§ 4013–4017, M. & V. The court may order the fees of all the attorneys to be paid from the common fund. Shan. Code, § 5035.

EFFECTS OF THE DECREE.

§ 67. 1. Each of the former tenants in common becomes a tenant in severalty of the share allotted to him. 2 All the parties *named* in the proceeding who have any interest in the premises, or may have any by reason of any contingency, and all unknown parties who are described and have notice by publication, and all persons who may claim under any party, are bound by the decree.[30] 3. There is an implied warranty of all to each of the title to his share, so that if he is evicted of the whole or any part of it, he can obtain compensation of the others in proportion to their shares; and if one has alienated his lot, his alienee is liable to make contribution in his stead. But if the alienee has been evicted, he cannot make the others contribute to his loss. If he took a warranty from his alienor, he must take his recourse on that; if he did not, it was his own fault, and he must abide the consequence.[31]

SALE FOR PARTITION.

§ 63. Any person who is entitled to a partition is equally entitled to have the land sold and the proceeds divided in two cases: 1. Where the premises are so situated that they cannot be partitioned. 2. Where the premises are of such a description that it would be manifestly for the advantage of the parties that they should be sold instead of being divided.[32] It may be possible to divide the premises between the parties, but it may be injurious to them; it would be to their advantage to sell and divide the proceeds, and in such case they have a right to have it sold. That right cannot be resisted on the ground that

30. § 4022, M & V.

31. Sawyer *v.* Cator, 8 Humphr. 256 This case does not cite 4 Humphr. 178, but the distinction between the two is clearly made in the able argument of counsel 8 Humphr. 274.

32. § 4024, M. & V.

it would be to the interest of the parties to keep the property, neither dividing it, nor selling it and dividing the proceeds. Either one has a right to demand his share in severalty; and when, in order to allot his share to him, it would be to the advantage of the parties to sell the property and divide the proceeds, then he has a right to have it sold, even if the court should be of opinion that it would be manifestly for the interest of all parties that there should be no partition either of the property or proceeds.[33]

MODE OF PROCEEDING.

§ 69. There are several modes by which the sale for partition may be effected: 1. By partition for sale alone on either of the two grounds mentioned above. 2. By an alternative petition, either for sale or partition. 3. Where the petition applies for partition only, and the answers ask for a sale, it may be decreed for satisfactory cause shown 4. The petitioners may amend their petition at any time, and pray a sale, though originally they only prayed for partition. 5. Although neither the petitioners nor the defendants ask a sale, if the commissioners appointed to divide the premises report that the whole or any part of them cannot be divided without great injury to the parties, the court may order a sale, if satisfied of the correctness of the report.[34]

The case is conducted in all respects as a bill or petition for partition only. The following may be mentioned as exceptions: 1. If there are infants or married women concerned, if a sale is asked, it is always referred to the clerk or master to report whether the premises are so situated that they cannot be divided, or whether they are of such a description that it would be manifestly for the interest of the parties to sell them. He is to take evidence upon these points, and report

33 5 Humphr. 404 34 §§ 4025–4030, M & V.

upon it The evidence must make it clearly appear that it is for the interest of the parties to sell in order to have a partition. And there must be evidence of facts reported to show it; the opinions of witnesses will not do. They must show the situation and description of the premises, so that it may appear to the court that it would be manifestly for the advantage of the parties to sell, instead of dividing the land.[35] The same course will be taken where adult parties resist the sale.

2. Incumbrances are to be disclosed in the petition or answer, or at least by the parties And either party, or after the sale a purchaser, may have it referred to the clerk to ascertain and report whether incumbrances do exist, and whether upon the whole or any particular share.[36]

§ 70. The clerk is regularly appointed to sell the land, but in cases that require it any other person may be appointed special commissioner. A minimum price is fixed in order to prevent any sacrifice, by combinations for that purpose. And, with a view to fix a minimum, it is referred to the clerk to take evidence and report upon the value of the land when he reports upon the policy of selling it. The court may decree it to be sold on credit or for cash. It is usually sold on credit, notes and good personal security being taken for the purchase money.

REPORT OF SALE. DECREE. PAYMENT.

§ 71. The clerk reports the sale to the court, and if there be no exception to the report, it is confirmed, and the title divested out of the parties and vested in the highest bidder. A lien exists on the land for the purchase money until the last dollar is paid, whether it is expressly retained in the decree or not.[37]

The part of the money due to adults is to be paid over

35 5 Sneed, 129 36 §§ 4040–4046, M. & V.
37. § 4035, M. & V.

to them, except married women and those of unsound mind. As to them, the court is to direct what disposition shall be made of it. Upon application a reinvestment of it in other property may be ordered. A married woman may receive her share in person, or, upon privy examination, may direct in writing, to be entered on the minutes of the court, how it shall be paid or invested. The court may either direct the shares of infants to be paid to their guardians, on their giving security, or otherwise invested.[38]

SALE OF REAL ESTATE TO PAY DEBTS OF A DECEDENT.

§ 72. Upon the death of a man his real estate vests in his heir, who is therefore called his real representative. His personal estate vests in his executor or administrator, who is therefore called his personal representative. It is all assets for the payment of his debts.[39] But his creditors must first seek the payment of their debts out of the personal estate and against the personal representative, and not until the personal estate in the hands of the personal representative is exhausted can they resort to the real estate and the real representative And this rule is equally applicable to creditors by judgment obtained against the deceased in his lifetime, as others.[40] Two modes are provided in the statute by which the land may be subjected to the payment of debts One is where the personal representative has been sued, and pleads "fully administered," or "no assets," or "not sufficient assets to satisfy the demand," and the plea is found in his favor. In this case the plaintiff may take judgment for his demand, and thereupon issue a *scire facias* against the heir or devisee of the land to show cause why that should not be subjected to the satisfaction of the judgment.[41] The other mode is

38 §§ 4048–4050, M & V
39. § 3090, M & V
40 Boyd v Armstrong, 1 Yerg. 58
41 §§ 3096–3104, M & V.

BY BILL OR PETITION.

§ 73. When the personal estate is exhausted in the payment of debts, and there are still debts unpaid, or the personal representative has paid them out of his own means, he may file a petition in the County, Circuit, or Chancery Court of the county in which the land of which the deceased died owner, or any part of it, lies, to have it sold for the payment of the outstanding debts.[42] The heirs or devisees of the deceased must be made defendants, else the sale will be void[43] The administrator may neglect to file the bill, where he has not paid debts out of his own means. It is therefore provided that any creditor may file it. And the very same object is attained as if the administrator or executor had filed it The creditor files the bill in behalf of himself and all other creditors, against the personal and real representatives, and the real estate is sold for the benefit of all.[44]

The address of the petition, the statement of the parties, and the commencement are the same as in the form of the petition for a divorce. The facts are then to be stated, as, 1. The death of the deceased. 2. The appointment of the petitioner, administrator, or executor, or, if a creditor is suing, the fact that he is a creditor and that A., one of the defendants, is administrator or executor 3. That the personal estate is exhausted in the payment of debts. 4. That debts still remain unpaid, stating the amount, as far as known. 5. That the deceased died seized and possessed of certain real estate, which descended or was devised to B., C., and D., the heirs or devisees. It then concludes with a prayer that process issue to compel the defendants to appear and

42. §§ 3105, 3171, 3172, 3207, 4981, M & V.
43. 10 Humphr. 223, 1 Baxt. 310, 1 Heisk. 726, 734; 5 Lea, 513; 10 Lea, 137
44. 6 Yerg. 53–68; 6 Heisk. 25; 3 Lea, 389.

answer the petition, and that the real estate be sold to pay the outstanding debts.[45]

The suit is to be conducted as other suits in equity. The bill therefore is to be filed with the clerk, a copy and subpœna issued and served on defendants five days before the return term, or publication made as to non-residents, and they are to come in and answer, or the bill be taken for confessed.

ANSWER AND REFERENCE TO THE CLERK.

§ 74. The heirs have a right to contend, 1. That the personal estate has not been exhausted. 2. That it has been wasted, and therefore the creditors must resort to the personal liability of the administrator and his sureties. 3. That the debts for which the land is sought to be sold are not justly due The heir may make this latter defense as to all debts, except debts by judgment obtained against the ancestor in his lifetime; as to them he can set up no defense, except it be of matter that accrued since the judgment. But as to other debts, although judgment has been obtained against the administrator, he may make any defense that the administrator might have made.[46] But this defense will be made usually before the clerk on the reference.

§ 75. Whether the bill is filed by the creditor or administrator, the course is to refer it to the clerk to ascertain: 1. Whether the personal estate has been exhausted. 2. Whether there are debts unpaid, to what amount, and to whom owing 3 What real estate the deceased owned at his death. If the heirs are adults and capable of acting for themselves, they may admit everything alleged in the petition, and dispense with this reference, and let a decree pass at once for the sale of the real estate. But

45. §§ 5057, 5058, M & V

46. 10 Humphr 223, 1 Yerg 58, 285; Mart & Y 353; 2 Yerg. 10; 1 Lea, 142.

the reference is usually made, and then the decree of the court depends upon the report of the clerk.

If there should be still a small, unexhausted portion of personal estate, that will not defeat the bill, but it will be sold first, and then the decree will pass for the sale of so much of the realty as is necessary to pay the remaining debts.[47]

§ 76. The fund raised by the sale is to be appropriated to the payment of all debts. Every creditor may present his demand to the clerk, and have it adjudicated and paid out of the proceeds of the land. The language of the statute is, that enough land shall be sold "to satisfy the debts or demands set forth in the bill or petition, and shown to exist." This language is to be construed liberally, in furtherance of the object of the proceeding, and it means all such debts as may be shown to exist in the course of the investigation originated *by* the bill, whether set forth in it or not The object of the law in the institution of this mode of proceeding was, 1. To save the costs of separate suits in behalf of each separate creditor against the heir by the first mode mentioned above, of *scire facias* on a judgment against the administrator. 2. To prevent the sacrifice of the estate in the payment of a few of the first judgments that might be obtained in that old mode of proceeding. This one suit by the administrator or an unpaid creditor is designed to bring the whole real estate into court, and dispose of it for the equal benefit of every creditor who may come forward with his demand and ask a participation in the fund And when this proceeding is instituted, if any judgment creditor is proceeding by *scire facias* to have the land sold for his own satisfaction, the court will stop him by injunction.[48] Both proceedings are aiming to appropriate the same fund: by the *scire facias*, one creditor is seeking to appro-

47. Dulles *v.* Read, 6 Yerg 53; 9 Heisk. 735.
48. Dulles *v* Read, 6 Yerg 65.

priate it to his own debt; by the petition, the administrator is seeking to appropriate it to the more liberal purpose of satisfying all debts alike, and the court will make the former design yield to the latter.

The sale is regularly made by the clerk, who reports it to court, and, if unexcepted to, a final decree is rendered, divesting the title out of the heirs, and vesting it in the purchaser.

Whatever remains of the proceeds of the land after the payment of all the demands duly filed and proved, belongs, as the land itself did, to the heir or devisee. It is not personal estate to be administered by the personal representative.[49]

CONDEMNATION OF LAND.

§ 77. A justice of the peace has power generally to carry his judgments into complete execution. There is one exception, which may as well be considered here as elsewhere. If an execution issued by him is levied on land, it must be returned to him, and he must transmit it, together with the judgment and all the papers in the cause, to the next term of the Circuit Court of his county. The object is that the court may examine the papers, and see that the judgment and execution and levy are valid, and direct the sale of the land by the sheriff. For this purpose the plaintiff moves the court to condemn the land. And if the papers are found valid, the court condemns it, and orders the sale of so much thereof as is necessary to satisfy the judgment And the clerk is to enter on the minutes all the proceedings of the justice, so that there may be a permanent record of the essential muniments of the purchaser's title. On this judgment of condemnation an order of sale issues to the sheriff, on which he proceeds to give notice and sell, as upon an execution levied by him on the land.[50]

49. 6 Humphr. 321. 50 §§ 3793–3796, M & V.

If the judgment and execution of the justice are valid on the face of them, they cannot be impeached by any extraneous evidence, whether they would thereby be proved either void or voidable. The defendant would have to attack them by a direct proceeding to investigate the fact, which, we have seen, would be by taking them by *certiorari* into the Circuit Court.[51] In the case last cited an execution issued against Ireland & Morgan, and was levied on Ireland's land, who opposed the motion to condemn his land on the ground that the judgment was against Ireland, Morgan and Boyers, and that the justice had erased the name of Boyers from the judgment, and issued the execution against Ireland & Morgan alone. The court doubted whether that rendered the judgment void or voidable but determined that the fact could not be investigated at all upon a defense to the motion for condemnation. If, however, the judgment, or execution, or return, or levy were void on the face of them, the motion to condemn would be overruled. The sale would be void, the purchaser would acquire no title, and it would, of course, be absurd to order the sale.

§ 78. The execution is not to be levied on land if any personal property is to be found; and it is said in Puckett *v.* Owen,[52] that if the return on the execution does not show that no personal property is to be found, the condemnation and sale of the land will be void. But in Crowder *v.* Sims,[53] the court say, "We are not aware that it has ever been held that an execution sale was invalid and void as to real estate, because the sheriff's return did not show properly that the personal estate had been exhausted The act seems directory in its terms and policy, and unless the act itself had declared that a noncom-

51. Turner *v* Ireland, 11 Humphr. 447; Cowan *v* Lowery, 7 Lea, 622.

52 Peck. 173.

53. 7 Humphr. 257 See 2 Head, 382, 3 Coldw. 153.

pliance with its directions should invalidate the sale, it is due to the purchasers that they should be protected from loss." Whatever might be the effect upon the sale, it would seem to be proper to require of the officer to show that he had obeyed the directions of the law, and to amend his return, so as to show that he could find no personal property. "No personal property found" is a good return, though "No personal property *to be found in my county,*" would be more accurate.[54]

§ 79. Where the judgment and execution is against several defendants, and the return is, "No personal property of the *defendant* to be found," the word "defendant" will be understood in a collective sense to comprehend all the defendants.[55]

§ 80. It need not appear in the officer's return, nor in the judgment of condemnation, that the land levied on lies in the county, if it is otherwise sufficiently described. It will be presumed, unless the contrary appear, that the officer did not levy on land beyond the limits of his jurisdiction.[56]

It was decided under the former law in Tennessee that when an execution was issued by a justice of one county on an execution issued by a justice in another county, and duly certified by the clerk of the County Court, it could not be levied on land.[57] But the statute of that State now provides that such an execution may be levied on land as well as goods, and when levied on land, it, together with the certified execution, shall be returned to the Circuit Court of the county where the land lies, there to be condemned and sold as if the original papers had been returned.[58]

§ 81. In condemnation cases the justice's papers should be returned and the judgment of condemnation had at

54. Frogg v Haggard, 2 Yerg 577.
55. Heffly v Hall, 5 Humphr 581.
56. 11 Humphr 520.
57. 11 Humphr. 122.
58. §§ 3786, 3787, M. & V.

the next term of the Circuit Court after the levy of execution; and it is said if this be not then done, or within a reasonable time thereafter, the creditor loses the lien resulting from the levy, so that the rights of an intervening purchaser will prevail over it.[59] The court does not state what would be unreasonable delay; but in the case in which this was said, a delay from January, 1862, to March, 1866, was held unreasonable, although the country was in a state of civil war, and the first court held after January, 1862, was in July, 1865.

The papers necessary to be returned to the court are the warrant with the returns on it, the judgment, and the execution with the levy indorsed on it.[60] On the motion to condemn the officer may amend his return. In one case he was allowed to sign his return on the execution, where he had previously neglected to do so.[61] If the defendant whose land is levied on dies before the order of condemnation is pronounced, or afterward, but before sale under the order, a revivor against the heir is necessary before proceeding.[62] If the proceeds of the land condemned and sold do not satisfy the plaintiff's debt, execution may be awarded from the Circuit Court for any balance remaining unpaid on the judgment.[63]

ATTACHMENT LEVIED ON LAND.

§ 82. Justices of the peace have the same right to proceed by attachment against property, to the extent of their jurisdiction over the subject-matter in controversy, that the Circuit Court has. And the proceedings after the issuance and service of the attachment are the same as if the suit had been commenced in the ordinary way — that is, by summons.[64] It follows that an attachment, returnable before a justice, may be levied on land, which

59 Anderson v. Talbot, 1 Heisk. 408
60 7 Lea, 622
61. Elliott v. Jordan, 7 Baxt. 376
62 1 Baxt. 324
63. 1 Baxt. 324.
64. § 4948, M. & V.

is a *service* of the attachment; and when it is returned in this plight, he proceeds to judgment against the defendant as the Circuit Court would. But the papers must be returned to the Circuit Court for an order to sell the land, as in the case of an execution levied on it.[65]

JUDGMENT OF CONDEMNATION.

§ 83. The entry of judgment of condemnation on the minutes of the court may be in the following form:

Condemnation of Land.

A B
v
C. D.

John Den, a justice of the peace of Wilson county, filed here in court the following papers: (Here copy the warrant, the return of the officer on it, the judgment, the stay, the execution, and the levy of it on the land.)

And on motion of the plaintiff, it is ordered by the court that the land so levied on be sold by the sheriff of Wilson county, to satisfy the aforesaid judgment of John Den, justice, and also the costs of this proceeding.

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65. § 4278, M & V.

CHAPTER XV.

PROBATE OF WILLS — PLACE OF PROBATE.

§ 1. The exclusive original jurisdiction of the probate of wills is in the County Court (*a*) They are to be proved in the court of the county in which the testator had his usual residence at the time of his death. If he had fixed places of residence in more than one county, it may be proved in either or any of the counties.[1] Residence ordinarily, though not always, means domicile; and it is a general rule that a man cannot have more than one domicile at the same time.[2] But for the purposes of testamentary jurisdiction, it is contemplated that he may have several fixed places of residence, or domiciles

Under the Tennessee Code, if the testator is not domiciled in the State, provision is made for the probate of his will in the county of the State or Territory of his residence, or before the mayor of any city or corporation. Upon presenting a copy of the will with this foreign probate, duly authenticated, to the County Court of the county where the land or estate devised or disposed of is situated, the court may order it to be recorded, and that gives it the same force and effect as if the original had been executed, and proved in the courts of that State.[3]

This language is broad enough to include the wills of resident citizens which might have been actually executed by them while out of the State. But it must have been mainly, if not exclusively, intended for the wills of nonresidents. It does not seem to apply to the wills of those who are domiciled in foreign countries. But it

(*a*) 6 Humphr. 13; 4 Coldw. 79

1. § 3010 M & V.

2. Story Confl. of Law, 45, a.

3. § 3024, M & V.; Williams *v.* Sanders, 5 Coldw 60; 7 Heisk 88

is provided that letters testamentary may be granted on the estates of those who resided in foreign countries, in any county where there may be real or personal estate of the deceased. And as letters testamentary are founded upon the probate of the will, it is necessarily implied that the wills of foreigners may be probated in the counties designated. By a recent act in Tennessee, foreign wills of personalty, proved according to the law of the country where made, are admitted to record upon the certificate of any minister, consul, ambassador, or other agent of the United States, and are to have the same force and effect as if executed and proved within the State.(*a*)

WHEN TO BE PROVED.

§ 2. At common law there is no definite time prescribed when, after the testator's death, the will is to be proved.[4] Nuncupative wills are not to be proved till fourteen days after the testator's death, nor can they be proved after six months from the making of them, unless reduced to writing within ten days.[5] No time is prescribed as to other wills, nor is there any particular provision made by the statute, or the common law, for barring a probate by lapse of time. The statute enacts that administration shall not be granted after the lapse of twenty years from the death of the decedent, except to distributees who were infants or married women at his death; and it allows them thirty years. It then provides that "all letters testamentary and of administration granted after said period" shall be void. As the probate of a will would confer a right to letters testamentary, it would seem that there could be no probate after the periods prescribed for granting administrations.[6]

(*a*) Acts Tenn., Approved April 1, 1903
4. 1 Wms Exrs 274, 1 Lomax Exrs 205
5. § 3007, M & V
6. § 3061, M. & V.; Townsend *v.* Townsend, 4 Coldw. 71

MODE OF PROBATE.

§ 3. There is no formality in offering a will for probate. The executor simply produces it in court and asks that he be permitted to prove the execution of it, and give bond and qualify as executor, or, in the more common language of the law-books, he moves that the will be admitted to probate, and that letters testamentary issue to him.

If the executor refuses, any legatee may offer it for probate.[7] What will be sufficient evidence of refusal is not decided in reference to this particular subject. But in regard to the appointment of an administrator with the will annexed, it is determined that his *neglect* to come forward and obtain letters testamentary is a refusal of the office.[8] And where two executors were appointed, and one only qualified, it was held that the neglect of the other to do so was sufficient evidence of his refusal.[9] Upon the same principle, his neglecting to produce the will for probate would be sufficient to authorize a legatee to do it. A legatee might easily avoid any question about it, by citing him to appear and prove the will; and if he did not do so, that would be sufficient. If he refuses to produce the will, the County Court may compel him to do so.[10] If he disobeys on summons, obedience might be compelled by attachment.

§ 4. Whoever may produce it, it will be necessary for him to show: 1. The death of the testator. 2. His residence in the county at the time of his death. 3. The due execution of the will. There is rarely any difficulty about the two first propositions. Members of the court are often cognizant of the facts Witnesses to the will are almost universally so. Where the testator has been

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7. Ford *v.* Ford, 7 Humphr. 92
8. 1 Humphr. 174.
9. 2 Humphr. 367.
10. § 3040, M & V.

absent from the county, there may sometimes be trouble in the proof of his death. So, difficulty sometimes occurs on the question of domicile. But it is to the mode of proving the execution of the will that we are to direct our attention.

There are two modes of probate. 1. In common form. 2. In solemn form.

PROBATE IN COMMON FORM.

§ 5. This is where the executor presents the will before the County Court, and in the absence of, and without citing the parties interested, produces witnesses, who testify by their oaths that the instrument exhibited is the true, whole, and last will of the deceased Upon this proof the court admits the will to probate [11] The amount and kind of proof necessary to establish the will in this form is the same as is required to prove it in solemn form, with one exception: where it is a will with subscribing witnesses, it is sufficient in common form, but not in solemn form, to prove it by one only of the witnesses.[12] What sort or what amount of evidence is necessary to prove the various kinds of wills in solemn form, will be seen when we come to examine the subject of contested wills.

PROBATE IN SOLEMN FORM.

§ 6. There are two modes of proving a will in solemn form. The first is at the instance of the executor, when he wishes to place the probate beyond the reach of future controversy. He cites all those who are interested, that is, the widow and next of kin, to be present at the probation, and then in their presence he offers the will for probate, and the witnesses are all examined as if the

11 6 Humphr 481; 1 Wms. Exrs 275, 1 Lomax Exrs 206.
12. § 3012, M. & V.

will were contested, and sentence is pronounced in its favor, if the evidence is deemed sufficient.[13] This mode of probate is rare, if it has been practiced at all in Tennessee, except in the case of nuncupative wills. In regard to them it is the common mode; they are not to be proved till process has issued to call in the widow or next of kin, or both, if conveniently to be found, to contest it.[14] It seems, however, from decisions of the court, that executors may resort to the practice.(a) The effect of a probate in this form is, that it is conclusive on the parties cited by the executor, and they can never contest the will The next of kin, duly notified by the executor to attend and witness the proceedings on the first probate, shall not disturb it.[15]

CONTEST. DEVISAVIT VEL NON.

§ 7. The next mode of proving the will in solemn form is, where those who are interested against it oppose the probate, or, in other words, contest the validity or genuineness of the will. They may do this, either when they are cited by the executor to come in and witness the probate, o they may come in without any such citation, and contest it; or they may have a former probate in common form set aside, and require a probate in solemn form

Except in the case of setting aside a former probate, there is no formality in being admitted a contestant. The applicant for a contestation must have an interest in the estate; and the test of interest is, that he would be entitled to a share of it, if the will propounded is invalid. If his interest is questioned, he must show it It would not do to let strangers come into court and

13 Note 6, *supra*, 9 Lea, 572
14. § 3007, M & V
(a) Burrow v. Ragland, 6 Humphr 481
15. Wynne v. Spiers, 7 Humphr. 394

enter into a contest in which they had no interest. But his interest being shown or unquestioned, he is, on mere motion, and on giving bond and security for costs, or taking the pauper oath, to have the probate transferred to the Circuit Court It is not necessary that all who have an interest in the estate opposed to the will should unite in contesting it. Any one who has an interest may do so, and the court may admit others who may afterward come into the suit. All have an interest to unite, for the decision in the contest with any of them is binding upon all.[16] As the practice is the same after probate in common form is set aside, we will see how that is done, before we give the mode of proceeding.

SETTING ASIDE FORMER PROBATE. PETITION.

§ 8. The mode of proceeding to set aside a probate in common form is by petition addressed to the County Court, in which the petitioner states his interest, and the facts upon which he relies to set aside the probate, and prays that the probate be set aside and the will re-probated. In a case where, for the purpose of showing his interest, the petitioner stated that the deceased was his grandfather, the court decided that it was not sufficient, because he did not state that his father was dead, and if he was living, the grandson had no interest in the estate.(*a*) The petition must also state such facts as show that the instrument is not really the will of the deceased, as, that he was insane, or that it was obtained by undue influence, or was not executed with the required formalities.[17]

The petition may be in the following form:

To the Worshipful County Court of Wilson County:

Your petitioner, John Den, respectfully represents that at the July term of your worshipful court, 1887, a writing purporting to

16. 8 Yerg 186, 7 Humphr. 320.
(*a*) Cornwell *v* Cornwell, 11 Humphr 485
17. Cornwell *v* Cornwell, 11 Humphr. 485

be the last will and testament of Richard Den, deceased, was admitted to probate at the instance of James Fern, who is named executor therein. Your petitioner is a grandson of said Richard Den, deceased, and his father is dead. Petitioner charges that said instrument is not the will of the said Richard Den, deceased, because he was, as your petitioner is informed and believes, insane at the time it was executed Petitioner therefore prays that the said James Fern be summoned to appear before your worships and answer this petition, that said probate be set aside, and the will transferred for re-probate to the Circuit Court of Wilson county, where your petitioner may contest its validity in an issue of *devisavit vel non*

H. CRABBE,
Attorney.

John Den makes oath that the facts stated in the foregoing petition are true, to the best of his knowledge and belief

JOHN DEN.

Sworn to and subscribed this 10th March, 1887

S. G STRATTON,
Clerk.

SUBPŒNA.

§ 9. Upon the filing of this petition, the clerk issues a subpœna, in the ordinary form, for the executor to appear at the next term of the court to answer it. It is true, no doubt, that a subpœna may issue without first filing the petition, and it may be sufficient to file the petition at the return of it; or it would probably be sufficient for the plaintiff to give notice to the executor without any formal process of summons. The practice has not been uniform; but we are describing the mode that would be most in consonance with the ordinary course of a lawsuit.

If the executor has not qualified, the administrator with the will annexed is the party to be summoned.

ANSWER.

§ 10. Upon the appearance of the executor, he is to answer the petition. He may admit or deny its statements. It is not a matter of course to set aside the probate and re-probate the will; it would be of most mischievous consequence if it were so; a stranger will not be permitted to disturb the existing probate; a kinsman, who is not the nearest of kin, and who could take nothing under the stat-

ute of distributions, if there were no will, shall not disturb it; the next of kin duly notified to attend and witness the proceedings on the first probate shall not disturb it, and other cases might be supposed.[18] The answer therefore may set up any matter which goes to show that the petitioner has no right to contest the will. It may deny the kinship stated; it may show that, notwithstanding the kinship, the party has by some act barred or waived his right to dispute the will.[19]

Length of time may be a bar; but what time would be sufficient is not defined. In Gibson *v.* Lane,[20] eighteen years had elapsed from the original probate to the application for a re-probate The court said that not less than twenty years would be sufficient, and they doubted whether that would be a bar.

Probably the same time that would bar the original probate would be deemed sufficient to bar the re-probate But whether that is fixed may be matter of uncertainty. The fact that the legatees have held the property bequeathed to them long enough to be protected in their title by the statute of limitations is no objection to the petition; for the decision of the controversy on the will can have no effect on their title under the statute [21]

§ 11. The answer may be in the following form·

The Answer of James Fern, Executor of Richard Den, Deceased, to the Petition of John Den.

The defendant admits the probate of the will of Richard Den, deceased, at his instance as executor, as stated in the petition He denies that the said Richard was insane when he executed the will He admits that the plaintiff is the grandson of the said Richard, and that his father is dead JAMES FERN

Sworn to and subscribed in open court this 12th March, 1887

J S MCLAIN,
Clerk.

18 7 Humphr. 394.
19. 1 Lomax Exrs. 207, 208
20 9 Yerg 475, 4 Coldw 71, 9 Yerg. 475.
21. 9 Yerg 475, 4 Coldw 71, 9 Yerg. 475, 2 Humphr. 178.

Upon such an answer as this the probate would be set aside. It admits the right of the petitioner to the contestation he desires. It denies only the fact relied on to show the invalidity of the will; and that can only be tried on the issue of *devisavit vel non*. If, however, it had denied that the plaintiff was the grandson of the deceased, or that his father was dead, or had set up any fact which barred his right to a re-probate, it would have been necessary for the court to determine the fact upon evidence to be adduced by the parties, and the questions of law involved. And from their decision, either party dissatisfied might have appealed to the Circuit Court, or, by consent, to the Supreme Court The petition is a suit, and either the refusal or the granting of it is a final decision.[22]

If the decision is that the probate be set aside, then the proceeding is the same as when opposition is made to the will when it is first offered for probate. We are therefore now prepared to revert to that point, and thence trace out the regular course of practice.

PROSECUTION BONDS.

§ 12. The contestant has to give bond and security, payable to the executor named in the will, in the penalty of five hundred dollars, conditioned for the faithful prosecution of the suit, and in case of failure therein, to pay all costs that may accrue thereon.[23] In the case of Ford *v.* Ford,[24] where the executor renounced the execution of the will, an administrator with the will annexed was appointed, and the bond was made payable to him, although he was not the party, but a legatee was propounding the will.

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22. 7 Humphr 394, 11 Humphr. 485.
23 § 3013, M. & V.
24 7 Humphr. 92

The bond may be in the following form:

We, John Den and David Fen, acknowledge ourselves indebted to James Fern in the sum of five hundred dollars, on the following condition. The said James Fern has offered for probate in the County Court of Wilson county, at the present term, a writing purporting to be the last will and testament of Richard Den, deceased, wherein the said Fern is named executor; whereupon the said John Den contests the probate, and the contest is transferred to the Circuit Court of said county. Now, if the said John Den shall faithfully prosecute the suit, or, in case of failure therein, shall pay all the costs that may accrue thereon, then the above obligation shall be void

Witness our signatures this 12th day of March, 1887.

JOHN DEN
DAVID FEN.

If the contest arises upon the setting aside of an old probate, the bond will be the same to the word "condition."

The recital may then be as follows:

A writing purporting to be the last will and testament of Richard Den, deceased, in which the said James Fern is named executor was admitted to probate in the County Court of Wilson county, at the July term, 1886, and the said probate is, at the present March term, 1887, set aside on the petition of said John Den, in order that he may contest the probate in the Circuit Court of said county. Now, etc, *as in the above bond*

§ 13. Any adult legatee who has notice of the contest and does not renounce his rights under the will is also required to give bond and security for the costs.[25] And if all the legatees are adult and fail to give bond as required, the will is not admitted to probate, but the estate is to be administered as in a case of intestacy.[26]

The bond is in the same penalty and subject to the same condition as the contestant's bond, but it is payable to the contestant, and may run as follows:

We, John Fern and Zadock Fern, acknowledge ourselves indebted to John Den in the sum of five hundred dollars, on the following condition:

James Fern has offered for probate in the County Court of Wilson county, a writing purporting to be the last will and testament of Richard Den, deceased, wherein the said James Fern is named ex-

25. § 3014, M. & V. 26. § 3015, M. & V.

ecutor, and the said John Fern a legatee, whereupon the said John Den contests the probate, and it is transferred to the Circuit Court of said county

Now, if the said James Fern, executor, shall faithfully prosecute the suit, or, in case of failure therein, the said John Fern, legatee, shall pay all costs that may accrue thereon, then the above obligation shall be void.

Given under our hands this 10th March, 1887

JOHN FERN,
ZADOCK FERN.

The Code of Tennessee says the bonds, both of the contestant and the legatee, shall be "conditioned for the faithful prosecution of the suit," and we have drawn these in the language of the statute. It seems to be considered that both the executor and the contestant are prosecuting a suit, one to establish, and the other to overthrow the will. We have made the condition of the legatee's bond that the executor shall prosecute the suit. It is ordinarily his suit, and not the legatee's. But the other part of the condition is, not that the executor shall pay the costs if the suit fails, but that the legatee who gives the bond shall pay them. As no bond is required of an executor, it does not seem to be contemplated that he shall be liable for costs. He prosecutes the suit for the benefit of the legatees. If he is also a legatee, a bond will be required of him, not as executor, but as legatee.

It is provided in the Code of Tennessee that "persons may be permitted to have an issue made upon any will, either as plaintiffs or defendants, in the form prescribed for paupers."[27]

An adult legatee might prosecute the contestation under this section, on taking the pauper oath. So might a contestant.

Upon the general question of the right of an executor or administrator, or guardian to sue, in his representative character, on making oath of his own poverty, the court expresses a doubt in McCoy *v.* Broderick, inclining,

27. § 3016, M & V.

however, to the opinion that he had the right.[28] But he could not prosecute such a suit on oath of the insolvency of the estate. As, however, the executor is not required to give bond and security in these will contests, it would follow that he is not required to take the pauper oath

ENTRY ON THE MINUTES AND TRANSFER TO THE CIRCUIT COURT.

§ 14. The bonds being given, the case is to be transferred at once to the Circuit Court for trial.[29] The fact to be certified is that the will was offered for probate, and contested. The fact must appear on the records of the court, and the record certified. The following may be the

Form of Entry.

James Fern produced for probate a writing purporting to be the last will and testament of Richard Den, deceased, in which the said James Fern is named executor. And thereupon came John Den, grandson and heir-at law of the said Richard Den, and contests the validity of said will, and having entered into bond in the sum of five hundred dollars to said James Fern, with David Fen, his surety, for the prosecution of the suit, it is ordered that the fact be certified to the Circuit Court of Wilson county, and that the original writing aforesaid be sent to said court

John Fern, a legatee in said will, also entered into bond to said John Den, in the sum of five hundred dollars, for the prosecution of the suit

The clerk, in certifying this entry, precedes it with the caption of the record, thus:

STATE OF TENNESSEE

At the County Court of Wilson county, held at the courthouse in Lebanon on the first Monday in March, 1887

James Fern produced — etc, *copying the above entry*

Then follows his certificate, thus:

The foregoing is a true and perfect copy of the record remaining in my office in the matter of the will of Richard Den, deceased

Given under my hand and the seal of said court, this 12th day of March, 1887. J S McCLAIN,
Clerk

28. McCoy v Broderick, 3 Sneed, 203 29. § 3013, M & V

This transcript, together with the original will and bonds, he files in the office of the Circuit Court clerk.

PROCEEDINGS IN THE CIRCUIT COURT. MAKING UP THE ISSUE.

§ 15. As soon as the clerk receives the record, he enters the case upon his docket, with the time when the record was filed. The executor is plaintiff and the contestant defendant.

At the first term of the Circuit Court after the filing of the record from the County Court, an issue is to be made up under the direction of the court to try the validity of the will.[30] This issue is very simple. "No particular form is required, but the party propounding the paper affirms it to be the testator's will, and the contesting party denies it.[31] The following form will suffice:

James Fern
v
John Den

CIRCUIT COURT OF WILSON COUNTY
May Term, 1887.

The plaintiff produces a writing purporting to be the last will and testament of Richard Den, deceased, dated February 1, 1887, attested by A and B, in which the plaintiff is nominated executor, and he avers that it is the last will and testament of the said Richard Fen, deceased

HENRY CRABB,
Attorney.

To this the contestant pleads as follows:

Contestant's Plea.

James Fern
v.
John Den.

The defendant, for plea, says that the said writing is not the last will and testament of Richard Fen, deceased

WM L BROWN,
Attorney.

The plea may, and probably does, most usually follow the declaration immediately on the same sheet. If so, the

30 . 3017, M & V

31. 7 Humphr 95

names of the parties need not be stated in the margin, but it may commence, "And the defendant, for plea, says," etc.

As the pleading in this action was not heretofore subject to the ordinary laws of pleading, it is not probable that the changes introduced by the statute on the general subject were intended to affect this issue. It is still provided, as it was in the former law, that "an issue shall be made up under the direction of the court," which would imply that it was not to be framed according to the general principles of pleading, but in some more convenient and appropriate form.

SPECIAL PLEAS.

§ 16. If the general law of pleading does not apply to this issue, special pleas are unnecessary. Under the general denial, the defendant might introduce any evidence which would show the invalidity of the will, whether it be properly matter of denial or avoidance. Testimony which would tend to show that the deceased never executed the will or not with the necessary legal solemnities would be, properly, matter of denial. But evidence of incompetency, undue influence, fraud, or coercion, would be properly in avoidance, and upon the general principles of pleading, would be inadmissible. But always, heretofore, such evidence has been admitted under the general form of denial, and doubtless such will still continue to be the rule.

Where the contestant only wishes to contest a part of the will, it is probable he may plead specially that that particular part is not the will of the deceased. The court was inclined to that opinion in Harrison *v.* Morton & Brown,[32] but did not positively decide it. The argument against it was, that every part of the will might thus be subjected to successive contests; whereas one contestation ought to be so framed as to preclude any future contro-

32. 2 Swan, 461

versy. It was decided that where there was a general denial of the whole will, the court might well reject any other pleas denying particular parts of it.

WHEN TO BE TRIED.

§ 17. It is not said in the statute when the issue is to be tried. But under the former law it was properly triable at the first term after the filing of the certificate, that is, at the issue term. And it is probable no change was intended. If the Circuit Court met so shortly after the term of the County Court that the parties could not have time to prepare for trial, an easy ear would be lent to an application for a continuance.

THE TRIAL. BURDEN OF PROOF.

§ 18. The trial is by a jury as on other issues of fact.[33] The plaintiff, the propounder of the will for probate, has the affirmative of the issue, and has, of course, to prove the will. If the contestation arises upon the setting aside of a probate in common form, the former probate passes for nothing, and the plaintiff has to prove the will as if it never had been proved before. He has only, however, to prove the due *execution* of the will. He has not to prove the sanity of the testator, or his freedom from improper influences, or to anticipate any of the defenses which the defendant may make. What kind of evidence will be necessary, of the due execution of the will, will depend upon what kind of will it is. If it be a will of land, the general rule requires that the execution be in accordance with the law of the place where the property is situated. As to that of personal property, it is sufficient, if it conform to the law of the testator's domicile.(*a*)

33. § 3020, M & V. This perhaps constitutes an exception to the rule requiring parties to ask for a jury in the pleadings.

(*a*) 1 Jarm. Wills, 3.

PRODUCTION OF THE WILL.

§ 19. The first step in all cases is the production of the will The original must in all cases be produced, unless it is lost or mislaid. Then, if it has been copied into the pleadings, or upon the minutes of the court, the trial may proceed as if the original were before the court [34] If it has not been so copied, it may be proved, like any other lost instrument, by clear and satisfactory evidence that it did exist, what were its contents, and that it had been lost. It is laid down in Williams on Executors, 312, that the proper mode in such cases is, for two unexceptionable witnesses who knew the contents to swear to them in the form of a deposition, and "in such cases the court will grant probate of the will as contained in the depositions of the witnesses" This was the rule, whether the will were lost before or after it was proposed to prove it. But in Tennessee the law is declared to be, that in any case where a will has been lost, or destroyed, or suppressed, either by accident or fraud, it may and can only be set up in a Court of Chancery in that State, however it may be done elsewhere [35] This decision does not apply to a case where a will has been lost after it was offered for probate in the County Court, and a contest raised on it.[36]

ALL THE WITNESSES TO BE PRODUCED.

§ 20. When a will, whether written or nuncupative, is contested, it must be "proved by all the living witnesses, if to be found." [37] By *all* the witnesses must be meant those who were chosen by the testator as witnesses, not including those who might have been casu-

34 § 3019, M & V
35. 8 Humphr 390 10 Yerg 48, 4 Coldw 83
36. 4 Coldw 71 37 § 3012, M & V.

ally cognizant of the facts. In the case of a written will, it includes those who subscribed it as witnesses at the testator's request. In the case of a nuncupative will, it includes those to whom he addressed the nuncupation. There are cases of written wills where there are no subscribing witnesses, and which have to be proven by witnesses not particularly selected by the testator. The law requires in such cases a particular amount and kind of testimony to prove them, and scores of persons may have the necessary knowledge. These are not the kind of witnesses, all of whom must be introduced None of them are *the* witnesses to the will, chosen as such by the testator; and it is sufficient, if as many of them are introduced as the law requires to prove such a will, without producing everybody who may have the same sort of knowledge.

WHAT IS EVIDENCE THAT A WITNESS IS NOT TO BE FOUND.

§ 21. All the living witnesses are to be produced, "if to be found." If they are not introduced, the plaintiff must show that they are not to be found. He may do this in two ways. 1. By having a subpœna issued to the sheriff, which he returns not found If it be not shown, then that the witness resided in some other county in the State, so that he might have been summoned, it will be presumed that he is not to be found[38] 2. It may be proved by any other satisfactory evidence If it is shown that the witness resides out of the State, it is sufficient evidence that he is not to be found, within the meaning of the statute. It is true that his deposition might be taken, with the will before him But the danger of losing wills by transmitting them to and from distant places to be proved, excuses the plaintiff from resorting

38. 5 Yerg 307, Meigs, 95

to that method, and authorizes him to treat it as a case in which the witness is not to be found.[39]

PROOF WHEN WITNESSES ARE DEAD OR NOT FOUND.

§ 22. Proof of their handwriting is necessary. As all are to be produced if living and to be found, so the handwriting of all who may be dead, or are not to be found, is to be proved. Although two subscribing witnesses are sufficient to establish a will, yet if there be three, and one only is absent, his handwriting must be established as the best substitute for his personal presence and testimony. So, if all are dead, or not to be found, the handwriting of all must be proved. But impossibilities are not to be required. Where it is shown that, upon diligent inquiry, proof of the handwriting of a subscribing witness cannot be had, it must necessarily be dispensed with But that will not render proof by one witness sufficient If there be but one besides him whose handwriting cannot be proved, there must be superadded to the testimony of that one evidence of the testator's handwriting. It might happen that no evidence could be had of the handwriting of any of the witnesses, and all of them might be dead or gone from the State. In that case two witnesses to the handwriting of the testator would be sufficient. And it is advisable in all cases where the handwriting of witnesses has to be proved, to prove also the handwriting of the testator.[40]

If the plaintiff takes the deposition of a subscribing witness who has moved to another State, he cannot then give evidence of his handwriting; for the very fact of taking his deposition proves that he can be found, and he has voluntarily run the risk of losing the will by its transmission, which would have excused him from taking the deposition.[41]

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39. Meigs, 95, 5 Yerg. 307
40. 11 Humphr 97
41. 11 Humphr. 97

The efficacy of evidence of the handwriting of witnesses depends on the presumption that they would not have subscribed their names as witnesses to a paper without sufficient knowledge of its genuineness.

WILL OF LAND, WITH WITNESSES.

§ 23. We will now briefly notice the different kinds of wills, and the peculiar evidences required to establish them. We merely intend to state the leading propositions that have to be maintained, referring to the authorities for an explanation of them We begin with wills of land. These are of two kinds: 1. Wills with witnesses 2. Holographic wills.

If the will in controversy is a will with witnesses thereto, the plaintiff must establish the following propositions: 1 That it was written in the testator's lifetime. 2 That it was signed by him, or by some other person in his presence and by his direction. 3 That it was subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of the land [42]

1 As to the first proposition, it need only be remarked that there can be no nuncupative will of real estate It must be written in the testator's lifetime.

2 It must be signed by him, or in his presence by his direction. This may be proved in several ways: 1 The witnesses may have seen him sign it, or may have seen somebody else sign it in his presence and by his direction. 2 He may have expressly acknowledged to them the signing of it 3. The production of the instrument to them as his will, and requesting them to attest it as witnesses If his name is then signed to it, it will be sufficient evidence that he signed it, or that it was done in his presence and by his direction. 4 If he produces the instrument, and requests them to attest it, although

42. § 3003, M & V.

he does not say it is his will, and although they do not know what it is, yet if his name then appears to it, it will be evidence enough of a signing.[43] 5. Proof of handwriting under the circumstances mentioned in the preceding section.

3. The third proposition may be subdivided as follows: 1. It must be subscribed by two witnesses at least. A subscription by making their mark will do, as well as the signing by the testator in the same way.[44] 2. They must subscribe it in the presence of the testator, which means where he can see them sign it.[45] It is not necessary that they should attest it in each other's presence.[46] 3. Neither of the two witnesses must be interested in the devise.

KNOWLEDGE OF THE CONTENTS OF THE WILL.

§ 24. This is a common-law requisite of all written wills. It is presumed from the formal execution of a will that the testator knew its contents. But if it appears that he was illiterate, or blind, or otherwise unable to read it, it must be affirmatively proved by the plaintiff that he fully understood its contents. This may be shown either by positive evidence that it was read over to him, or by any other satisfactory evidence that he had the necessary knowledge.[47] And although two witnesses are necessary to the formal execution of the will, that is, the signing and attestation, yet one is sufficient to the fact of his knowledge of the contents. It is, like any other fact, to be established by satisfactory evidence, the law not defining the *quantum* of that evidence by any arbitrary rule.[48]

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43 1 Lomax Exrs. 60, 2 Greenl. Ev., § 676, Tate *v.* Lawrence, 11 Heisk. 511.
44 7 Humphr. 92.
45 2 Greenl. Ev., § 678.
46. 5 Sneed, 97.
47 4 Sneed, 81.
48. 4 Sneed, 81. 1 Jarm. Wills, 44.

HOLOGRAPHIC WILLS.

§ 25. This will derives its name from its being wholly written by the testator himself, and it is the proof of that fact alone, or almost alone, that establishes it. If a will is established by witnesses, it is no matter whether it is written by the testator or a stranger, and even the signature may be in the handwriting of another, if directed or adopted by him.

It requires the concurrence of the following facts to establish a holographic will:[49] 1. The writing must appear to be the will of the deceased Though it is accompanied with all the formalities required to make a will, yet if it appears that he had not finally decided on the particular instrument as his will, it cannot operate as such. The absence of the required formalities, its being unfinished; not having his signature; not disposing of all his estate, appointing no executor, being in the form of loose memoranda or notes; being altered from time to time — these facts indicate that he had not finally decided on it as his will.[50]

2. It must be wholly written by himself. If any part of it is written by another, it is fatal to it, as a devise of land

3 His name must be either subscribed to it, or written in some part of it.

4. It must be found, after his death, among his valuable papers, or lodged in the hands of another for safekeeping This fact is necessary to show that he regarded it as valuable, and intended to preserve it. If it is found among worthless papers, it will show that he did not intend it to operate as a disposition of his estate[51]

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49 § 3004 M & V

50 11 Humphr 377, 1 Baxt 398 2 Baxt 85, 3 Baxt 116, 5 Coldw 129

51. 11 Humphr 377, 465; 5 Sneed, 385, 11 Lea, 316, 6 Lea, 674, 2 Head, 303, 306.

5. His handwriting must be generally known by his acquaintances This may be proved by direct proof, or by circumstances. His business may have been such as to bring his handwriting before his acquaintances generally. But if he seldom wrote, or his writing was seldom seen, the inference would be against that general knowledge of it which the law requires [52]

6 It must be proved by at least three credible witnesses that they verily believe the writing and every part of it to be in the hand of the testator. No particular number of witnesses is required as to the other facts.

WRITTEN WILLS OF PERSONAL PROPERTY.

§ 26. A will of personal property, like a will of lands, has to be written in the testator's lifetime, except under the special circumstances to be noticed under the head of nuncupative wills. But, unlike a will of lands, nothing more is necessary to its validity than the single fact that it was reduced to writing in the testator's lifetime. It is neither necessary that it should be written by the testator himself, nor that it should be attested by subscribing witnesses, nor even that it should be signed by the testator, or by anybody else for him [53] Statutes in many of the States, as well as in England, have required wills of personalty to be executed with the same formality as wills of land But in Tennessee the distinction is retained, and it seems to be the recognized law that there is nothing requiring so little formality or solemnity as the making of a will of personalty If the paper makes a disposition of property to take effect after the death of the testator, that is sufficient. Thus, a deed of gift which cannot operate as such for the want of delivery, may be held a testamentary disposition; so may private letters, and drafts on

52 11 Humphr. 465, *supra*, note 50
53. Wms Exrs 56-58; Lomax Exrs 33-48

bankers, and stocks, or bills indorsed ' for A. B.," or a note indorsed " I give this note to C. D.," and so, promissory notes of the testator, not delivered to the beneficiary. It is not necessary for the validity of the instrument as a will that the testator should have intended to perform, or be aware that he has performed a testamentary act, as before stated, it is only necessary that the paper contain a disposition of property to take effect after death [54]

If a will is sufficiently proved to pass lands, it will of course be sufficient to pass personalty. But what inferior degree of evidence will be sufficient, is the question to be considered. We cannot examine it here, but will refer the student to the books in which he may find the law.[55]

Although it is not necessary that there should be any subscribing witnesses, or any formality of attestation in any respect, yet it requires two witnesses to prove the execution of the will They need not be both present at the making of it.[56]

Where there are subscribing witnesses, they must be all produced, if living and to be found The rule in this respect is the same in regard to wills of personalty and of land.

NUNCUPATIVE WILLS

§ 27. A nuncupative will is where the testator, without any writing, declares his will before a sufficient number of witnesses He does not intend it to be reduced to writing in his lifetime, but to be lodged in the memory of the witnesses. They may reduce it to writing either before or after his death And it must be reduced to writing when it is offered for probate Before the statute 29 Charles II, it was not necessary that a will of personal property should be executed in writing under any circum-

54. 6 Humphr 451, 2 Humphr 202, 597, 10 Yerg 321

55. Loma Exrs 34–48, 217–233, Wms Exrs 55–94, 286–301, Meigs' Digest (Tenn) § 2730

56. 6 Yerg. 425, 10 Humphr 562.

stances. That statute required that they should be in writing, except under special circumstances. The Code of Tennessee contains substantially the same provisions Under this statute the plaintiff will have to make the following proof:

1. He introduces the will as reduced to writing by the witnesses, which may be in the following form:

> On the 17th day of March, 1887, John Hale, deceased, in his last sickness, at his own habitation in Wilson county, declared in the presence of the undersigned, whom he especially requested to bear witness thereto that his will was as follows
>
> 'That his sister Elizabeth should have his horse, Bob, that his sister Sarah should have his cow, Jane, that his brother James should have one thousand dollars that the children of his deceased brother John should have the balance of his property, and that his brother James should be his executor
>
> The said John Hale died on the 18th March, 1887
>
> Written and signed by us, this 19th March, 1887
>
> JOHN HERN,
> JOSEPH HERN

It is not absolutely necessary to embody in the writing a recital of the circumstances that are necessary to the validity of the will, as, that it was in his last sickness, at his habitation, and the special request to bear witness, as is done in the above form [57] But it is usual and proper.

2. The will has to be proved by two disinterested witnesses, who were present at the making thereof. They must be both present at the same time, and hear the same nuncupation.[58]

3. The testator must especially require the witnesses, or some of them, to bear witness to the will. This is to prevent remarks that are merely casual from being proved as a will [59] He need not in express words request them to bear witness. "It is sufficient if by intelligent act and

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57 1 Lomax Exrs 101, 2 Rob 435, 8 Humphr. 844, 7 Peisk 216.
58. 10 Yerg 501, § 3006, M & V
59 10 Yerg 501, § 3006, M & V, 1 Sneed, 616, Lomax Exrs 92 2 Coldw 31

language he invoke their special attention and attestation to what he is going to say, or to what he has said." [60] Or, if, on being told he would die, and being requested to state what disposition he wishes to make of his property, he answers by declaring his will.[61]

4 The will must be made in his last sickness It must be in apprehension of speedy dissolution. If he recovers, the will is not valid.[62]

5. The will must have been made in the testator's own habitation or dwelling-house, or where he had been residing ten days at least, except he be surprised by sickness on a journey, or from home, and dies without returning to his dwelling [63]

These are the requirements in the probate of a nuncupative will The provisions of the statute in regard to such wills have been strictly enforced by the courts, and they have generally adopted a rigid construction of the statute Independent of the statute of frauds, the *factum* of a nuncupative will requires to be proved by more strict evidence than a written one The testamentary capacity, the *animus testandi,* and the *rogatio testium* at the time of the alleged nuncupation must appear by the clearest and most indisputable testimony [64]

WILLS OF SAILORS AND SOLDIERS.

§ 28. The will of a person in the military or naval service of the United States, made in a foreign country, or at sea, may be admitted to probate in the county of his domicile, on the certificate of the commander of the regiment or of the vessel to which he belonged, that the testator acknowledged, or the subscribing witnesses proved

60. 4 Humphr 342 61. 8 Humphr 639.
62. Lomax Exrs 98
63. Lomax Exrs 98, § 3006, M & V
64. Redf Wills, part 1, 187, 188, Smith *v* Thurman, 2 Heisk. 110.

the will before him But the heirs or next of kin may contest the validity of the will. On the trial of the issue, the certificate of the commander is *prima facie* evidence for the plaintiff.[65]

FOREIGN WILLS.

§ 29. The Code of Tennessee provides that wills made in any other State or Territory, or in the District of Columbia, may be admitted to record by the County Court of any county in the State "where the land or estate disposed of by the will is situated," upon a duly certified copy of the will and the probate thereof in the courts of the State where made, and the copy thus recorded is to have the same force as if the original had been proved in this State. But "any person interested to contest the validity of such will may do so in the same manner as though it had been originally presented for probate in said court.[66]

This provision is somewhat vague, and does not in terms make any distinction between wills of personalty and of lands, but the Supreme Court has given it a reasonable construction, so that it is practically a re-enactment of the common law Touching the capacity of the testator to make a will of personal property, and the formalities of its execution at the common law, its validity depends on the law of the domicile of the testator at the time of his death, and the probate of such a will there is conclusive everywhere.[67] But as to wills of land the rule is otherwise, they are governed by the law of the place where the land lies.[68] Such also being the construction given to the statute of Tennessee, it follows in that State that a will of personalty made in another State by a tes-

65. §§ 3031, 3032, [illegible] & V 66 §§ 3022–3030

67 2 Greenl Ev, § 672, Story Confl of L 465–468, 5 Coldw 79; 7 Heisk 88

68. 2 Greenl Ev, § 672, Story Confl. of L 465–468, 5 Coldw 79.

tator who is domiciled in the foreign State at the time of his death, the will being probated there, may be entered of record in Tennessee, and executed without re-probate The probate abroad is conclusive, and the question cannot be again opened. But if the testament be a will of lands, the probate abroad has no other effect than a probate in common form, to which the recording of it in Tennessee would add no additional force. Any party in interest at the time it is offered for record, or after it is recorded, may demand a probate in solemn form upon an issue *devisavit vel non.*[69]

DEFENDANT'S EVIDENCE.

§ 30. After the plaintiff has proved the due execution or nuncupation of the will, the defendant is to introduce his testimony to impeach it. This will, of course, be as various as the grounds upon which the validity of a will may depend. It may be directed altogether to the point of the due execution of the will, or it may be intended to show that, notwithstanding it was executed with the necessary formalities, it was invalid for some other reason. We will barely refer the student to the leading grounds upon which a will may be assailed, and to some of the authorities in which he may find them expounded.

INCAPACITY OF THE TESTATOR.

§ 31. 1. *Infancy* constitutes an incapacity An infant cannot make a will of land, but a girl of twelve and a boy of fourteen may make a will of personalty [70]

2 *Coverture*, at the common law, completely incapacitated a woman for making a will of lands. She could, upon the consent of her husband, make a will of personalty.[71] At an early day, however, exceptions were made

69 Williams v Sanders, 5 Cold v 60
70. 4 Kent Comm 506, 1 Sneed, 477 71 Wms Exrs 45–52

in favor of the exercise of her testamentary power as to lands, as, where the right was exercised under an antenuptial agreement, or in execution of a power of appointment, or in regard to lands held for her separate use.[72] The tendency of recent legislation throughout the States is to remove all restriction, and place married women upon an equal footing with single persons in the disposition of their estates. In Tennessee a married woman may, by will, dispose of any separate estate, real or personal, owned by her, unless the power to do so is expressly denied to her in the instrument of settlement; and so, any married woman owning land or real estate of any kind or description, legal or equitable, although not technically separate estate, has full power and authority to dispose of it by will, the same as if she were unmarried, but she cannot in this case exercise the power so as to defeat the husband's estate in the land as tenant by the curtesy.[73]

3. *Insanity* This is the most common objection made to the validity of a will. Sanity is always presumed until insanity is shown. He who impeaches a will on this ground must show that the testator was insane when the will was made But this may be shown by evidence of insanity before and after the date of it.[74]

To what extent witnesses may give their opinions of the sanity or insanity of the testator, has been a matter of a good deal of discussion and perplexity. It has been decided, 1 That subscribing witnesses alone could give their opinions without assigning any reason for them

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72. 1 Jarm Wills, 81

73 §§ 3009, 3350 3351, M & V

74 7 Humphr. 92 2 Sneed 631, 3 Humphr 282 7 Baxt 551, 580 8 Baxt 511 2 Baxt 82, 363 A person insane upon some subjects, and sane upon all others, is competent to make a valid will 6 Coldw 28 See also generally upon the subject of mental capacity of the testator, an elaborate and learned note, 1 Jarm Wills (Randolph & Taylor's ed), 91–144

2. Physicians may give their opinions, but then they must describe the circumstances or symptoms on which they base the opinion. 3. Other witnesses may state the appearance, conduct, and conversation of the testator, or other facts in regard to the state of his mind, and may then state what opinion of his sanity they deduce from the facts.[75] It is a general rule relating to wills of lands that all questions as to the capacity of the testator and his power to make a disposition of the property must be governed by the law of the place where the property is situated (*a*)

UNDUE INFLUENCE. FRAUD.

§ 32. This is another objection to the validity of a will. The influence may be by threats, operating upon the fears of the testator. It may be by importunity, so that he made the will for the sake of peace, and not freely. If it is obtained by fraud, it is invalid.[76]

REVOCATION.

§ 33. If the will has been revoked, that is a sufficient objection to it. There are several ways of revoking a will One is by tearing, burning, cancellation, or other act intended to destroy it (*b*) Another is by a subsequent will. Another is by express, simple, direct revocation, not containing any other disposition of the property. There is an implied revocation when the testatrix, being a single woman, afterward marries, or where the testator afterward marries, and has a child [77]

A will of lands can only be revoked by an instrument

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75. Gibson v Gibson, 9 Yerg 329
(*a*) 5 Coldw 60. 1 Jarm Wills, 1. 1 Redf Wills, 387
76 6 Yerg 272, 1 Jarm Wills (Randolph & Taylor's ed), 131, note
(*b*) 3 Head, 164, 7 Humphr 92, 104
77 Wms. Exrs 106–152, 1 Jarm Wills, 268–341

executed with the same solemnity; that is, it must be signed by the testator, and attested by two subscribing witnesses, or it must be wholly written by the testator, and proved as a holographic will.[78] A written will of personalty cannot be revoked by a subsequent nuncupative will, unless it is proved by two witnesses that it was written in his lifetime, read over to him, and approved by him.[79]

VERDICT AND JUDGMENT.

§ 34. The verdict may be in favor or against the whole will, or in favor of part and against part.[80] In the latter case the parts established and rejected should be particularly described in the record of the verdict. The judgment, as in other cases, follows the verdict. They may be in the following form:

In Favor of the Will.

James Fern, Exr., etc
t
John Den } CONTESTED WILL.

Came the parties, and a jury, to wit, A, B, C, etc., who being elected, tried, and sworn the truth to speak on the issue joined, upon their oath do say that the writing mentioned in the issue is the last will and testament of Richard Den, deceased. Therefore it is adjudged by the court that said writing is the last will and testament of the said Richard Den, deceased, and that the plaintiff recover of the defendant and also, on his motion, of D F, his security for the prosecution of this suit the costs herein accrued. Ordered further that the clerk certify a copy of the record in this case, to the County Court of Wilson county, together with the original will, to be there recorded.

Verdict Against the Will.

Same as the above to the words "in the issue." Thence proceed:

Is not the last will and testament of the said Richard Den, de-

78. McCracken v. McCracken, Peck, 301; 2 Head, 304. A written will cannot be revoked by parol. 6 Lea, 674; 6 Heisk. 392. A mere *intention* to revoke is not revocation. 7 Humphr. 93; 2 Head, 167. But revocation may be express or implied. 2 Sneed, 159.

79. § 3008, M. & V.; 5 Sneed, 50.

80. 2 Swan, 461; 2 Humphr. 202; Peck, 301.

ceased It is therefore adjudged by the court that the said writing is not the last will and testament of the said Richard Den, deceased, and further, that the defendant recover of G H, a legatee, who has given bond for the faithful prosecution of this suit, and I. K, his security in said bond, the cost therein accrued

§ 35. If the executor is the plaintiff, and no legatee has given security for costs, it is not certain what sort of judgment should be given for the costs, if the verdict is against the will. In Virginia, where the law is the same that it is in Tennessee, that the unsuccessful party shall pay the costs, it has been determined that an executor propounding a will for probate, which was contested, was not liable for the costs of the action, though unsuccessful.[81] The condition in which the deceased left his papers was the cause of the suit, and his estate, it is said, ought, on that account, to pay the costs. On the other hand, it might be said the executor is not bound to offer the will for probate, but may leave it to the legatees, and if he voluntarily does it himself, he should be made subject to judgment for costs. We know it has been to some extent a practice in the Circuit Courts to render judgment against him for the costs, but always with doubts as to its propriety.

EFFECT OF THE JUDGMENT.

§ 36. It is conclusive upon all the parties concerned. Though but one of the heirs or next of kin contests the will, the decision is conclusive upon all the others, and they will never be permitted to disturb the probate.[82] So, if the decision is against the will, no legatee can ever afterward set it up[83] The legatee being an infant at the time of the decision, will make no difference.[84] But this is to be understood of a fair probate, or rejection of the probate. If it is the result of fraud and col-

81 Lomax Exrs 248, 4 Call, 423. 82 8 Yerg 186
83. Wms. Exrs 285 84. 1 Lomax Exrs 342.

lusion between the parties, the judgment may be set aside, and the innocent parties permitted to renew the contest.[85]

But while a probate remains unreversed, it is conclusive evidence of a will of personalty, and it cannot be collaterally assailed.[86] At common law there was no regular probate of a will of land. In any trial in which the devisee had to show title under the will, he had to produce the original and prove it. With us he produces a copy of the will, and the probate in the County Court, and it is *prima facie* evidence. But the defendant may insist upon the production of the original, and contest its validity.[87]

CERTIFYING TO COUNTY COURT AND RECORDING.

§ 37. If the will is established in the Circuit Court, the original, with a copy of the issue, verdict, and judgment, has to be certified to the County Court, to be there recorded.[88] The original will is always recorded in that court when proved, and it is also retained. Copies only are issued to executors, or others who may want them.

If the contestant has a probate in common form set aside by the County Court, and the will transferred to the Circuit Court for re-probate, and there withdraws his opposition to it, this operates as a restoration of the former probate, and the plaintiff does not have to prove the will again. In this case, too, the record must be certified to the County Court.[89] If the contestation arose upon the first offering of the will for probate, and the defendant were to withdraw his opposition in the Circuit Court, the effect would be, as we suppose, to restore the jurisdiction of the County Court to proceed and admit the will to probate in common form.

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85 Wms. Exrs. 284, 1 Lomax Exrs. 347, 7 Humphr. 388.
86 Wms. Exrs. 450, 1 Lomax Exrs. 341.
87. § 3039, M. & V.; 9 Humphr. 272.
88. § 3020, M. & V.
89 2 Swan, 162.

CHAPTER XVI.

CRIMINAL PROCEDURE.

§ 1. All criminal actions are prosecuted in the name of the State against the party charged with the offense. There are three modes of commencing such an action.

First By arresting the offender upon a warrant issued by a magistrate. Magistrate in this connection means any officer having the power to issue a warrant for the arrest of a person charged with a public offense, and includes judges of the Supreme Court, judges of circuit and criminal courts, justices of the peace, and mayors and recorders of cities and towns upon whom criminal jurisdiction has been conferred.[1]

The warrant of arrest may be in the following form:

STATE OF TENNESSEE — WILSON COUNTY

To any lawful officer of the State

Information on oath having been made to me that the offense of (naming it), has been committed and accusing A B thereof, you are therefore commanded, in the name of the State, forthwith to arrest the said A B and bring him before me, or some other magistrate of said county, to answer the charge

C D,
Justice of the Peace for Wilson County.

Except where the offense is committed in the presence of the magistrate, the warrant can issue only upon information on oath The magistrate is required to examine the informant on oath, to reduce the examination to writing, and cause the informant to sign it, and he shall issue the warrant only when the information satisfies him that the offense has been committed, and

1 Shan Code, §§ 6974, 6975

there is reasonable ground to believe the accused guilty thereof.[2]

It may be executed by the sheriff or his deputies, by the coroner, constable, or other authorized person into whose hands it may lawfully come, anywhere in the State, and, if the accused has fled, or resides out of the county where the offense was committed, the magistrate may issue the warrant to any county in the State[3]

Second. The second mode of commencing a criminal action, is by arrest without a warrant. An officer, and also any private person may arrest another without a warrant in the following cases.

1. For a public offense committed in their presence.

2 When the person arrested has committed a felony not in their presence.

3 When a felony has been in fact committed, and the one making the arrest has reasonable cause to believe the person arrested has committed it.

The officer may also arrest, without warrant, to prevent a breach of the peace when it is threatened in his presence[4] The right of the private citizen to make an arrest is confined to crimes within the State of his residence, and does not extend to offenses committed in another State[5] And when he makes an arrest he shall, without unnecessary delay, take the prisoner before a magistrate, or deliver him to an officer, in which case it shall be the duty of the officer to take the prisoner before the magistrate.[6]

4. When a public offense is committed in the presence of a magistrate, he may, by verbal or written order, command any one to arrest the offender, and may thereupon proceed as if he had been brought before him on a warrant of arrest[7]

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2. Shan Code, §§ 6979–6981.
3. Shan Code, §§ 6987–6990.
4. Shan Code, §§ 6997, 7002
5. 6 Pickle, 490
6. Shan Coce, §§ 7001, 7005
7. Shan Code, § 6996

PROCEEDINGS BEFORE THE MAGISTRATE.

§ 2. These proceedings are in the nature of an inquiry. The object is not punishment In "small offense" cases, that is, misdemeanors, where the punishment does not involve imprisonment, or a fine above fifty dollars, and the offender submits to the jurisdiction of the court by pleading guilty, the magistrate may finally dispose of the case by a fine of not less than two dollars nor more than fifty dollars.[8] The power conferred on the magistrate to thus punish the offender upon his plea of guilty is not in contravention of the constitutional guaranty "that no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment," for the reason that a misdemeanor is not a "criminal charge" in the constitutional sense[9] Upon the plea of guilty, it would still be the duty of the magistrate to hear the testimony of the witnesses, so that he may know the nature of the case, and thus intelligently determine the fine to be imposed, and whether or not the offense is within the jurisdiction conferred by the plea.

In all other cases the magistrate proceeds with the investigation of the case in order that correct answers may be given to these two questions· 1. Has an offense punishable under the laws of the State been committed? 2 Is there probable cause to believe the defendant guilty thereof? Upon this inquiry, the defendant is entitled to the aid of counsel, and it shall be the duty of the magistrate to inform him of his right, and allow him a reasonable time within which to procure the same It is the right of the defendant to have a "speedy public trial" and the magistrate is to enter upon the examination of the charge as soon as practicable.[10] Witnesses in behalf

8 Shan Code, § 6953
9 Const Tenn, art 1, § 14, 9 Humphr 43, 6 Coldw. 385
10 Const Tenn, art 1, § 9, Shan Code, § 7010

of the State shall be first examined, and their testimony reduced to writing by the magistrate, or under his direction, and signed by the witnesses.[11] At the conclusion of the State's evidence, the defendant may make a statement, in writing, in his own behalf. This statement is to be reduced to writing by the magistrate, and is to be read over to the defendant and signed by him, but it is not required to be sworn to. The defendant may waive the right to make a statement, and such waiver shall not be used against him on the examination before the magistrate, or on the trial in court.[12] After the defendant has made his statement, or waived his right to do so, he may then introduce witnesses in his own behalf, the testimony to be reduced to writing and signed as in the case of witnesses for the State.

Upon the conclusion of the testimony, the magistrate, upon the proof, determines the correct answers to the two questions above mentioned. If he answers *either* of them in the negative, the case is at an end, and it is his duty to immediately discharge the defendant.[13] If he answers *both* of them in the affirmative, it is then his duty to take the necessary steps to secure the presence of the defendant before the circuit or criminal court to answer the charge upon indictment by the grand jury, and this he does in one of two ways. First, by taking bail or security for the defendant's appearance at the next term of the court. This he is allowed to do in a large proportion of cases, but not in all. The Constitution and laws of the State designate the cases which are bailable and those which are not.[14] The undertaking, or bail bond, as it is called, is to be signed by the defendant and his sureties, and may be in the following form:

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11 Shan. Code, §§ 7016, 7021.
12 Shan. Code, §§ 7016, 7017, 7021.
13 Shan. Code, § 7022. 14 Const. Tenn., art. 1, § 15.

STATE OF TENNESSEE — COUNTY

We, A B and C D, promise to pay the State of Tennessee dollars, unless the said A B appear at the next term of the Circuit (or Criminal) Court of county, to answer the charge of (naming the offense), and does not depart the court without leave

Approved G H (Name of officer) A B,
C D

If the defendant is unable to give the bond and security, or if the charge be one for which bail is not allowed to be taken, as in the case of capital offenses where the proof is evident or the presumption great,(*a*) then the magistrate must adopt the second mode of securing the defendant's appearance at court, which is by committing him to jail for safe-keeping And this the magistrate does by an order in writing, called a *mittimus*, which may be in the following form:

STATE OF TENNESSEE — WILSON COUNTY.

To the sheriff or Jailer of said County

A B. having been examined before me on a charge of (naming the offense), and it appearing that such offense has been committed, and that there is sufficient cause to believe him guilty thereof, and he having failed to give bail as required (or, "and the offense not being bailable," if such be the fact), you are therefore commanded to receive him into your custody, and detain him until legally discharged This day of , 19

G H
(Name of committing officer)

The next duty of the magistrate is to return all the papers to the court at which the defendant is bound to appear, and this ends his connection with the case It is now in court to await the action of the grand jury

§ 3. Third The third mode of instituting a criminal prosecution is by

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(*a*) Const Tenn, art 1, § 15

PRESENTMENT, INDICTMENT, OR IMPEACHMENT.

The Constitution of Tennessee, art. 1, § 14, declares "that no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment." It is not intended to discuss impeachment in this chapter. It is sufficient to say that it is the accusation of a civil officer before the Senate by the House of Representatives, and the object is to deprive the officer of his place, and disqualify him to hold office in the future. The proceeding is rare and extraordinary. It will be more profitable to the student to direct his attention to the procedure in ordinary prosecutions.

Blackstone defines a PRESENTMENT to be "the notice taken by the grand jury of any offense from their own knowledge or observation without any bill of indictment laid before them"[15] At common law the party thus presented could not be put to answer the presentment, it was merely an informal information of an offense having been committed, signed by the foreman of the grand jury, upon which the Attorney-General preferred a bill of indictment, signed by himself and submitted to the jury, and it was upon this, when returned "a true bill," that the defendant was put to answer. This informal notice, proceeding from the grand jury, and which was called the presentment, is abandoned in practice — so at least in Tennessee. Now, when the grand jury wish to present an offense, they call upon the Attorney-General to prepare a presentment in the form of an indictment, which he submits to them without his signature; it is then signed by all of the jury and returned into court, and it is to this the defendant is to answer.

An INDICTMENT is defined to be "a written accusation of one or more persons of a crime or misdemeanor, pre-

15. 4 Bl Comm. 300

ferred to and presented upon oath by a grand jury" [16] It is *preferred*, that is, delivered to them by the Attorney-General, signed by him, and it is *presented*, that is, approved by them on oath, by indorsing on it the words "a true bill," signed by their foreman.

It will be observed that in substance of statement the presentment and the indictment are identical, and there is no difference between them in legal effect. They differ in matter of form, in that the first is signed by all the jury; the latter by the Attorney-General, and indorsed "a true bill" by the foreman of the jury. They differ also in this, the presentment proceeds from the grand jury upon their own motion and is sustained by facts within their own knowledge, while the indictment proceeds from the Attorney-General and is sustained by the testimony of witnesses. The essential element of both of these constitutional modes of criminal accusation is that they must emanate from a grand jury. It is alone in that important body that the Constitution lodges the ordinary accusing power of the government. How its members are appointed and how it is organized has been explained in the chapter on Trial. The court appoints from their number a foreman, and the clerk then administers, first to the foreman and then to his associates, the following

Oath.

You do solemnly swear (or, affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county, that you will keep secret the State's counsel, your fellows', and your own, that you will present no person from hatred, malice, or ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God

16. 4 Bl Comm 302

Upon taking this oath they are charged or instructed by the court concerning the general character of their duties It is made the special duty of the judge to give in charge certain offenses enumerated in the statutes of the State. As to other offenses, he exercises his discretion, which is regulated by the exigencies of the particular locality and times. The jury then retire, accompanied by an officer appointed and sworn to attend them, to a room in the courthouse, or conveniently located, where they prosecute their inquiries in privacy.

The organization of the grand jury is a part of the proceedings of the court, and must therefore be entered on the minutes It being the first business of the term, the entry of it comes immediately after the caption of the record. This entry constitutes the caption of all indictments and presentments preferred during the term, whenever a transcript of them is made for any purpose. It may be in the following form:

The Sheriff returned the following list of jurors, appointed by the County Court of said county, at the March term, 1903, to serve at the present term of this court, to wit, A, B, C, D, etc, thirteen of whom, to wit, A, B, C, etc, good and lawful men, were duly elected a grand jury, of whom the said A was, by the court, appointed foreman, and the said grand jury being impaneled, sworn, and charged to inquire for the body of the county of Wilson, retired to consider of presentments

PROCEEDINGS BEFORE THE GRAND JURY.

§ 4. It is now proper to consider the powers and duties of the grand jury and their mode of procedure, and this will now be done, beginning with

PRESENTMENT.

The oath of the jurors is, that they will diligently inquire, and true presentment make, of all offenses, etc. How and to what extent may they make inquiry? In Tennessee there are but two modes by which they may

make inquiry with the view of returning presentments, and these are: 1 By the disclosure of facts within the knowledge of a member or members of the jury. 2. By the discovery of facts through the testimony of witnesses called before them to testify. The first of these modes was originally the only way in which a grand jury could present offenses on their own motion. When pursuing this mode of inquiry, they were to diligently inquire of one another as to the knowledge they might respectively have of offenses, and each one was to disclose to the body, on his oath as a juror, what violations of criminal law may have fallen under his observation. They could not proceed upon suspicion, information, or belief that an offense had been committed and send for witnesses and investigate it Nor could they send for witnesses to supply any defect that might exist in the testimony of their fellow jurors. They were to inquire only of each other, and if satisfied from this intercommunication that an indictable offense had been committed within the county, they would then call upon the Attorney-General to prepare a formal presentment, to be signed by them and returned into court. But now the power of the grand jury has been greatly enlarged, and under the second mode of making inquiry they may, in respect to a number of offenses, send for witnesses and make investigation whenever they or any one of them suspect a violation of the law This is commonly referred to as the *inquisitorial power* of the grand jury, and in Tennessee it is exercised in respect to thirty or more offenses enumerated in the statutes, the following common offenses being included in the number. Gaming, tippling, disturbance of worship, injuries to public buildings, keeping saloon open on election days, going armed or carrying concealed weapons, illegal voting, selling liquors to students, selling or giving cigarettes or cigarette paper

to minors, etc[17] The design of this enlargement of the powers of the grand jury was to enable them, upon acquiring the necessary information from witnesses, to present the offenders in the same way as if they themselves personally knew them to be guilty.[18] These added powers are in derogation of the common law and cannot therefore be extended beyond the express provisions of the statute.[19] In the exercise of these powers the jury may demand subpœnas of the clerk for the witnesses, who are to be sworn by the clerk or by the foreman of the jury

We have already remarked that a presentment is signed by all the jurors. It *must* be signed by at least twelve of them, as a less number than that cannot make a presentment It is, in addition, required by the Code, that when it is made on the evidence of witnesses, "the names of the material witnesses for the State, examined before the grand jury, shall, in all cases, be indorsed thereon before it is presented to the court"(*a*) If it is found on the knowledge of a juror, there is no necessity for showing in or on the presentment upon whose information it was made (*b*)

When signed by the jurors, it is returned into court as an indictment is; and it is usual and proper that the return should be entered on the minutes, but it is not necessary It being signed by twelve of the jurors, is evidence enough that it was found by a competent jury. But an indictment is only signed by the Attorney-General and indorsed by the foreman a true bill; the only legitimate evidence that it was found by a competent jury is, that the jury came into court and returned the bill.(*c*)

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17. Shan Code, § 7046
18 9 Yerg 389, 5 Yerg 363
19. 4 Coldw 196, 2 Lea, 648, 1 Swan, 19.
(*a*) Shan Code, § 7057.
(*b*) 1 Humphr 290
(*c*) Meigs, 112.

INDICTMENT.

This is also prepared by the Attorney-General, and is signed by him and by him preferred or delivered to the grand jury. The Code of Tennessee provides that "no Attorney-General shall prefer a bill of indictment to the grand jury without a prosecutor marked thereon unless otherwise expressly provided by law,"[20] and the law in that State has expressly provided as many as twenty-four different cases in which this may be done.[21] The student is referred to the Codes for an enumeration of such cases. They include in Tennessee indictments upon an inquest of willful murder, upon a charge of gaming, of drawing a lottery, of keeping a billiard table without license, of carrying a bowie knife or Arkansas toothpick, of tippling without license, of the sheriff allowing a prisoner to be lynched, and in any case upon an order of the court, which may be made when it appears to the court that an indictable offense has been committed and that no one will be prosecutor.

The objection for the want of a prosecutor may be made by motion to quash or by plea in abatement,[22] but the objection comes too late after verdict.[23] An infant may be a prosecutor.[24] A married woman cannot,[25] except when she is deserted by her husband.[26] The husband cannot be marked as prosecutor of the wife, nor the wife as prosecutor of the husband.[27]

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20 Shan Code, § 7058
21. Shan Code, § 7059
22. 5 Sneed, 64
23. Shan Code, § 7217.
24 1 Head, 392
25 11 Humphr 41
26. State *v* Travis, 1 Shan. Cases, 593
27 6 Lea, 582. It is said in this case that "by statute, the wife may, in certain cases, prosecute the husband No such statute can be found The statement was not necessary to the decision of the case.

The Attorney-General, in all cases not falling within the exceptions above mentioned, is to indorse on the indictment not only the name of the prosecutor but also the names of the witnesses who are to be examined by the grand jury. These witnesses are sworn by the clerk as follows:

You solemnly swear on the Holy Evangelists of Almighty God that the evidence you will give the grand jury on this bill of indictment against A B shall be the truth, the whole truth, and nothing but the truth

The officer of the grand jury then takes the indictment and the witnesses before them, to be examined in regard to the charge. They can hear no evidence but that which the Attorney-General adduces. If they want other evidence, they should procure it through him. Whether they may demand the summons of a witness themselves, may be questionable. The defendant is not allowed to be present or to introduce evidence

If twelve of the jury are satisfied of the truth of the accusation, the foreman indorses on it "a true bill," subscribes his name to it, and the whole jury return into court, are called by the clerk to see if twelve are present, and the foreman presents it to the court, and it is filed by the clerk. If twelve do not concur, the foreman indorses it "not found," and they return it in like manner [28]

The clerk must enter on the record the fact of its return. There can be no other evidence that it was found by the jury [29] The entry is made in the following form:

STATE *v* A B

The grand jury returned into court a bill of indictment against the defendant for gaming, a true bill

If it is a bill of several counts, they may find it true as to one count, and not true as to others But they cannot

28. 8 Yerg 166, Shan Code, §§ 7055, 7056, 7060

29 8 Yerg 170, 4 Humphr. 270, 7 Humphr 155; 8 Humphr. 118.

find one part of a single count to be true, and another false Thus, if the indictment is for murder, they cannot find it true for manslaughter, and not true for murder; or if it is for an assault with intent to murder, they cannot find it true for the simple assault, and not true as to the intent to murder.[30] It is not necessary to the validity of their finding that they should use the precise words, "a true bill."[31]

All indictments for felony returned "a true bill" shall be entered on the minutes by the clerk, and the originals compared with the entry by the judge before he signs the proceedings of the day.[32]

FORM OF INDICTMENTS AND PRESENTMENTS.

§ 5. The statement of the facts constituting the offense in an indictment or presentment should be in ordinary and concise language, without prolixity or repetition In no case are the words "force and arms" or "contrary to the form of the statute," or 'moved and instigated by the devil," or other words not essential to constitute the offense necessary or proper[33] If the statement, clearly and concisely made, embodies all the requisites that go to constitute the offense, it is sufficient.[34] It should be sufficiently distinct and certain to enable the defendant to understand the nature of the charge he is called upon to answer, and to protect himself from a second prosecution for the same offense.[35] The name of the defendant need not be repeated every time he is referred to in the indictment, and except in an indictment for an assault with intent to commit murder, it is not

30. 11 Humphr 602
31. Meigs, 109
32 Shan Code, § 7101
33 Shan Code, §§ 7077, 7078
34 6 Lea, 215, 3 Heisk 258, 334, 476
35 Peck, 66, 3 Humphr 370, 3 Lea, 38, 326, 705.

necessary to describe the wound or the weapon used.[36] The leading principle in criminal as in civil pleading is that they should be clear, concise, intelligible, stating only what is necessary, and stating that in ordinary language.

A few forms illustrating these principles will now be given

1. Presentment for Carrying Pistol.

STATE OF TENNESSEE — WILSON COUNTY

Circuit Court, May Term, 1903

The grand jurors for the State, upon their oath, present that John Smith did on the 1st day of March, 1903, publicly and privately carry a pistol, the same not being an army or navy pistol carried openly in the hand, against the peace and dignity of the State

Second count And the grand jurors aforesaid, upon their oath, further present, That on the day and year aforesaid, the said John Smith did publicly and privately carry an army and navy pistol, the same not carried openly in the hand, against the peace and dignity of the State

A,
B,
C, etc.,
Grand Jurors.

[To be signed by not less than twelve members of the grand jury.]

The offense charged in this form of presentment is one which the grand jury may return upon their own knowledge or upon the testimony of witnesses which they may have called before them and examined. If the latter course be the one pursued, then the names of the witnesses examined must be indorsed on the presentment. The offense is charged in the language of the statute creating it, and that is sufficient.[37] Immediately after the words "the grand jurors for the State" it is common to say "duly elected, impaneled, sworn, and charged to inquire for the body of the county aforesaid," and then proceed, "upon their oath," etc., as in the form, but such words are unnecessary and therefore not proper

36 3 Heisk. 1, 475; 2 Swan, 226, 6 Baxt. 580, 2 Lea, 223, 8 Sneed, 69.

37 2 Lea, 221, 3 Lea, 163, 2 Swan, 229.

The fact that the grand jury was properly selected, impaneled, sworn, and charged appears in the entry on the minutes,[38] which constitutes the caption of every presentment or indictment found during the term, and it is not necessary to repeat in them what is contained in that caption.[39]

Stating the day of the month and year is sufficiently certain as to time In Tennessee, the particular time at which an offense was committed need not be stated in the indictment, it is sufficient to state that it was committed on any day before the finding of the indictment, unless the time is a material ingredient in the offense, which would be the case where the offense charged was a violation of Sunday laws.[40] It is too late, after verdict, to object for indefinite time in the indictment [41]

Formerly, in Tennessee, it was necessary to allege in the indictment where the offense was committed, but that is now unnecessary It is sufficient to show in the proof a state of facts bringing the offense within the jurisdiction of the county in which the indictment is preferred.[42] Place would have to be stated only when it was material to the offense.[43]

"Against the peace and dignity of the State" is the only conclusion necessary in Tennessee, and that is necessary because the Constitution of the State requires it.[44]

The second count in the above form is appropriate to meet the language of the statute defining the offense. The offense intended by the statute to be punished is going armed, and it may be committed in either of two ways, first by carrying a belt or pocket pistol or revolver, and second, by carrying an army pistol in any other way

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38 See *ante*, p 13, note *a*

39 Mart. & Y 128, 1 Yerg 206, 233, 3 Heisk 21, 1 Humphr 388 2 Coldw 197; 11 Lea, 514

40 Shan Code, § 7087 41 8 Baxt 560

42. Shan Code, § 7088, 3 Heisk 65

43. 3 Heisk 48 44 Const Tenn, art 6, § 12.

than openly in the hand. The Attorney-General and the grand jury may be certain from the statement of the witnesses that the offense of going armed has been committed, but not certain in which of these two ways it was committed, and hence the offense is charged as having been committed in both ways but in separate counts The Code of Tennessee provides that an offense may be charged in an indictment in different forms, so as to meet the evidence in the case; and where it may have been committed by different means, the means may be alleged in the same count in the alternative [45] It would seem from this provision that the two counts in the foregoing form might have been united in one count, in the alternative form, thus. "did, etc, carry a pistol, the same not being an army and navy pistol carried openly in the hand, *or*, an army and navy pistol, the same not being carried openly in the hand." But decisions in that State render such a statement bad [46] The reasoning of the decisions referred to is that carrying a pocket pistol is one offense and carrying an army pistol not openly in the hand is another offense, and hence it is bad pleading to unite them in one and the same count, in the disjunctive form, for, in such case, the defendant could not certainly know to which offense he would be required to answer But as they are offenses of the same nature and class, both may be charged separately in different counts of the same indictment or united in the same count if the conjunctive form is used, as "did, etc, carry a pistol, the same not being an army pistol carried openly in the hand, *and* an army and navy pistol, the same not being carried openly in the hand.[47] The statement by separate counts is preferable

45 Shan Code, § 7084
46. 3 Heisk. 131, 4 Coldw. 183
47 10 Lea, 35, 5 Coldw 26, 2 Shan Cases, 501; 3 Heisk 132, 4 Lea, 176

2. Presentment for Gaming.

STATE OF TENNESSEE — WILSON COUNTY

Circuit Court May Term, 1903

The grand jurors for the State, upon their oath, present that C D did, on the 1st day of May, 1903, play at a game of cards for money, against the peace and dignity of the State

(Signed as in Form 1)

If the game was for something else than money, state what it was; and if there be doubt on this point, the statement may be, "did play at a game of cards for money and whisky and corn," etc The proof may then show what was played for.

3. Presentment for Selling Liquors.

(Caption as in Forms 1 and 2)

The grand jurors for the State, upon their oath, present that C. D did, on the 2d day of May, 1903, sell and tipple spirituous and alcoholic liquors without having given the bond and subscribed the oath, and obtained the license required by law in such cases, against the peace and dignity of the State

(Signed as in Form 1)

4. Presentment for Selling Liquor to a Student.

(Caption as in Forms 1 and 2)

The grand jurors for the State, upon their oath, present that C D did, on the 15th day of May, 1903, sell, give, and deliver vinous and spirituous liquors to one G H, who was, at said time, a law student of Cumberland University, an educational institution, said sale, gift, and delivery being made without the consent of the parent, guardian, and person having the care of the said G H., against the peace and dignity of the State

(Signed as in Form 1)

5. Indictment for Larceny of a Horse.

(Caption as before)

The grand jurors for the State, upon their oath, present that A B did, on the 14th day of May, 1903, feloniously take and carry away one black horse, the property of C D, and of the value of one hundred dollars, against the peace and dignity of the State

G H,
Attorney-General.

The officer who signs the indictment is called in Tennessee Attorney-General He is variously designated in the States He is the representative of the State in all criminal prosecutions The above indictment is properly signed by him, and upon the back he indorses the names of the witnesses, and the name also of the prosecutor. The grand jurors return it into court indorsed "A true bill" or "not a true bill," which indorsement is signed by the foreman of the jury.

6. Indictment for Larceny of Law Books.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the 10th day of May 1903, feloniously take and carry away two volumes of Bouvier's Law Dictionary, one volume of the Code of Tennessee, one volume of History of a Lawsuit, and three volumes of Meigs' Digest of the Laws of Tennessee, the property of the trustees of Cumberland University, and of the value of fifty dollars, against the peace and dignity of the State

G H
Attorney General

7. Indictment for Injury to Building.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the day of , 1903, wantonly injure, deface, and disfigure Caruthers Hall, a law school building in the town of Lebanon, county and State aforesaid, the property of the trustees of Cumberland University, by painting the front steps and front doors of said building with red paint, and breaking the locks of said doors, against the peace and dignity of the State

G H,
Attorney General

8. Indictment for False Pretense.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the 1st day of May, 1903, with intent to defraud G H, falsely pretend and state to him, the said G H, that he, the said C D, then had one hundred dollars deposited to his credit in the Bank of Lebanon, at the town of Lebanon, county and State aforesaid, and that said one hundred dollars was subject to his personal check, and did, by said false pretense, obtain from the said G H

one black horse, the personal property of the said G H, and of the value of one hundred dollars, against the peace and dignity of the State (Signed as before)

9. Indictment for Embezzlement.

(Caption as before)

The grand jurors for the State, upon their oath, present that C. D did, on the 3d day of May, 1903, and while acting as the duly appointed agent of A B, and by virtue of said employment came into the possession of one black horse and one bay mule to be by him delivered to the said A B, and that afterward, and while in the continued possession of said horse and mule, as such agent, to wit, on the 10th day of May, 1903, he the said C D, did embezzle and fraudulently convert the same to his own use against the peace and dignity of the State (Signed as before)

10. Indictment for Fraudulent Breach of Trust.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did on the 1st day of May, 1903, receive on deposit and for safe keeping from A B, the owner thereof, five hundred dollars in gold coins of the United States, and afterward and while so holding and keeping said coins he, the said C D, did fraudulently appropriate the same to his own use, against the peace and dignity of the State (Signed as before)

11. Indictment for Perjury.

(Caption as before)

The grand jurors for the State, upon their oath, present that in the suit of A, plaintiff, and B, defendant, pending in the Circuit Court of Wilson county, of which said court had jurisdiction, both as to the parties and subject matter, and wherein it was material to show in the proof whether the debt sued for in said action had been paid, C D was called and sworn by the clerk of the court as a witness in behalf of the defendant, and that, notwithstanding the truth was no part of said debt had been paid, the said C D did, on his examination in open court, and under his said oath, willfully, corruptly, and falsely swear and state that said debt had been paid, against the peace and dignity of the State

(Signed as before)

12. Indictment for Burglary.

(Caption as before)

The grand jurors for the State, upon their oath, present that C. D did, on the 2d day of May, 1903, and in the county and State

aforesaid, break and enter into the mansion-house (or, dwelling-house) of A B., in the night time, with the intent to feloniously take and carry away the personal goods of the said A B, then and there to be found and had in said mansion-house (or, dwelling house), against the peace and dignity of the State.

(Signed as before)

13. Indictment for Receiving Stolen Property.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the day of , 1903, fraudulently receive and conceal one bay mule of the value of one hundred dollars, the property of A. B, with intent to deprive the owner thereof and well knowing, at the time of receiving and concealing the same, that said mule was stolen property and had been feloniously taken and carried away, against the peace and dignity of the State

(Signed as before)

14. Indictment for Forgery.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the 1st day of May, 1903, with intent to defraud A B, falsely and fraudulently make a writing, purporting to be a negotiable promissory note signed by the said A B, payable to the said C D, or order, on the 1st day of September, 1903, and for the sum of one hundred dollars, against the peace and dignity of the State. (Signed as before)

15. Indictment for Arson.

(Caption as before)

The grand jurors for the State, upon their oath, present that C D did, on the 1st day of May, 1903, in the county and State aforesaid, willfully and maliciously burn the dwelling house of A B., against the peace and dignity of the State (Signed as before)

16. Indictment for Murder in the First Degree.

(Caption as before.)

The grand jurors for the State, upon their oath, present that C D did, on the 3d day of May, 1903, willfully, deliberately, maliciously, and premeditatedly kill A B, against the peace and dignity of the State (Signed as before.)

17. Indictment for Assault with Intent to Commit Murder in the First Degree.

(Caption as before)

The grand jurors for the State, upon their oath, present that C. D, on the 3d day of May, 1903, feloniously and maliciously

assaulted A. B with a loaded pistol, with intent willfully, deliberately, maliciously, and premeditatedly him, the said A B, to kill (or, "with intent upon him, the said A B, to commit murder in the first degree"), against the peace and dignity of the State

(Signed as before)

It is not necessary to further multiply these forms; those given are sufficient for the instruction of the student in the principles by which he is to be guided in their preparation.

§ 6. It is now proper to consider the proceedings in court after the indictment or presentment has been passed upon by the grand jury and returned into court. The first object is

TO SECURE THE PRESENCE OF THE DEFENDANT.

He may voluntarily appear and enter into a recognizance (bond) for his continued appearance during the term, or at the next term, should the case be continued. And so, if the prosecution was commenced before a magistrate, and the defendant was committed to jail, or released upon his bail bond, he is usually in attendance or in prison, and no process is necessary to bring him in If in jail, the sheriff is ordered to bring him in; if out on bail, the Attorney-General has him called by the sheriff, and if he does not answer the call by presenting himself in court, a conditional judgment may be taken against him and his sureties in his bail bond, or against him alone, if instead of bail bond he has deposited money with the clerk, which he is allowed to do, as security for his appearance. The manner of taking this conditional judgment is much the same as in taking judgment by default in civil cases The sheriff, under the direction of the Attorney-General, calls the defendant thus: "O yes; O yes, John Smith come into court and answer the State of Tennessee on a charge of larceny (or as the case may be) or you will forfeit your recognizance (or, deposit)" The

sureties upon his bail bond are called as follows: "O yes; O yes, A. and B. come into court and bring with you the body of John Smith to answer the State of Tennessee upon the charge of larceny or you will forfeit your recognizance" This conditional judgment may be made absolute upon the return of *scire facias* unless the parties give a good and sufficient reason for the defendant's failure to appear.

The process to compel the defendant's appearance is called a *capias*, and in all cases, except those in which the defendant voluntarily appears or is in prison and therefore subject to the order of the court, this process is issued by the clerk upon the return of the indictment or presentment Its command to the sheriff is, that he take (arrest) the defendant and bring him before the court at the present or succeeding term. It may be issued to all sheriffs in the State, and any sheriff or deputy may execute it in any county in the State[48] Upon the arrest, under the *capias*, if the offense be bailable, the sheriff shall take bail from the defendant in the manner prescribed by law.[49]

NOLLE PROSEQUI, OR DISMISSAL.

After an indictment has been found it cannot be dismissed, discontinued, or abandoned except by leave of the court[50] The Attorney-General cannot do so without the assent of the court, but in two cases the court may do so without the consent of the Attorney-General. These are. 1. Where the defendant has been bound over by a magistrate and has not been indicted at the term of court at which he was bound to appear. 2. Where he is not brought to trial at the next regular term after the indictment is found, unless the trial has been postponed on his own application

48 Shan Code, § 7076
49. Shan Code, § 7068.
50 Shan Code, § 7154

ARRAIGNMENT OF THE DEFENDANT.

This consists, first, in calling the defendant to the bar by his name, and in some States commanding him to hold up his hand, that he may be certainly identified; second, in reading the indictment to him, which is done by the clerk or the Attorney-General, that he may understand the charge against him; and third, interrogating him as to his plea, thus. "How say you, C D., are you guilty or not guilty?" Arraignment is necessary in all felonies, and in some jurisdiction its omission is a fatal error. It nay, in the mere matter of formality, be waived by the defendant, and he may plead without formal compliance with the rule It is never done in misdemeanor cases, though in strictness the rule applies to them.

STANDING MUTE.

The defendant may refuse to answer as to his defense, that is, he may stand mute. The case cannot be proceeded with until his plea is entered, and where he refuses to put it in, the law provides that it shall be the duty of the court to enter the plea of not guilty, and the case then proceeds as if the defendant had put it in.[51]

CONFESSION OF GUILT.

He may answer "guilty," thereby confessing that he is guilty of the charge in the indictment In case the offense charged is a misdemeanor, the court proceeds at once to judgment, but if it be a felony, the case is submitted to a jury to determine the degree of guilt, if it is a homicide, and to find the period of his confinement in the penitentiary, if it is a penitentiary offense, and thereupon the court gives sentence

51. Shan Code, § 6441

PLEA IN ABATEMENT.

If the indictment gives the defendant a wrong christian or surname he may plead the misnomer in abatement, but he must disclose his true name in the plea, and then he may be reindicted by the name disclosed.

If one of the grand jurors had not the necessary legal qualifications this fact may be pleaded in abatement [52] And so if the grand jury proceeded in an illegal manner in making the presentment, this may be pleaded in abatement [53] And defense may be made in like manner if the mode of summoning and impaneling the grand jury was not in conformity to the requirements of the law.[54]

MOTION TO QUASH INDICTMENT.

If an indictment is so defective that judgment, on conviction, could not be pronounced on it, it may be quashed on motion of the defendant. Where there are two counts, the court may sustain a motion to quash one.[55] The court is not bound to quash on motion, but may leave the defendant to his demurrer or to his motion in arrest of judgment [56]

DEMURRER.

The defendant may also demur to the indictment or presentment for insufficiency in law, and upon the demurrer being overruled he may plead over without regard to the grade of the crime or misdemeanor.[57] But demurrers are seldom used, as the same advantage may be taken on the plea of not guilty or after verdict in arrest of judgment.[58]

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52. 7 Yerg 271
53. 4 Humphr 255, 275; Meigs, 99
54. 10 Humphr 512, 11 Humphr. 222.
55. 6 Humphr 435.
56. Meigs, 192, 6 Humphr 435
57. Shan Code, §§ 7178, 7179
58. 4 Bl Comm 334.

SPECIAL PLEAS IN BAR.

This mode of making defense in criminal actions is not allowed to the same extent as in civil cases Special justifications or excuses are not allowed, neither is the plea of the statute of limitations in felony cases, but may be in some misdemeanor cases Even if the indictment be found in the wrong county, it need not be presented by special plea All these defenses may be relied upon under the general issue not guilty.

But the special pleas of *autrefois acquit*, *autrefois convict* and *once in jeopardy* are in common use.[59] In misdemeanors the plea of *autrefois convict* is a confession of guilt, and, on being found against the defendant, judgment is rendered against him[60] But in a felony case he has the right to plead not guilty, the correct judgment being *respondeat ouster*.[61]

NOT GUILTY.

This is the most common plea, the others being of comparatively rare occurrence. The defendant does not file this plea in writing, as he does the others When he is asked by the clerk whether he is guilty or not, he simply answers, "Not guilty," and the clerk enters it on the minutes thus:

Indictment for Murder.

The State
v
John Smith

Came the Attorney General and the defendant in proper person, who, being arraigned and charged upon the indictment, says he is not guilty in manner and form as therein charged, and for his trial

59. 9 Yerg. 357, 6 Humphr. 410, 4 Sneed, 597, 10 Yerg. 532
60. 4 Sneed, 532
61 4 Bl Comm 338

puts himself upon the country, and the Attorney-General doth the like

This makes an issue to be tried by the country, that is, by a jury. The same form of entry will do for every sort of case Although in misdemeanors there is no formal arraignment, yet the defendant is called upon to plead, and does plead not guilty, and it is equivalent to formal arraignment.

CONTINUANCE.

An indictment always stands for trial at the term at which it is found, if the defendant can be arrested and brought before the court, but a continuance may be had by the Attorney-General on the defendant as in civil cases

There is one ground of continuance by a defendant in a criminal case which is not generally deemed sufficient in a civil suit He is entitled to one continuance upon affidavit that there is too great an excitement to his prejudice to come to trial at the first term at which the case is regularly triable.[62] Costs are not imposed as terms on the State, but always on the defendant, whenever it would be done in a civil case

When the cause is continued, the defendant must either be committed or give bail for his appearance at the next term The following is the form of the recognizance:

Indictment for Assault and Battery.

The State }
v }
John Smith }

The defendant and James Smith and Joshua Smith, his sureties, came into court, and agreed to pay the State of Tennessee five hundred dollars, unless the defendant appear at the next term of this court, to answer an indictment for assault and battery, and does not depart without leave

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62 Shan Code, § 7172.

CHANGE OF VENUE.

In all criminal prosecutions the venue may be changed upon the application of the defendant, when it is made to appear to the court that from undue excitement against the prisoner or any other cause a fair trial could not probably be had in the county where the offense was committed [63] The change cannot be had on the application of the State [64]

The venue is to be changed to the nearest adjoining county free from exception, and of two equidistant adjoining counties, the defendant may elect. The record is to be transmitted, and the defendant and his witnesses recognized to attend the trial in the proper county. If the case is not bailable, the sheriff takes the defendant and delivers him to the sheriff of the county to which the venue is changed.

TRIAL. IMPANELING JURY.

The first step in a trial is the impaneling of a jury. In misdemeanors, this is usually done as it is in civil cases But the defendant might, no doubt, insist upon a full panel, as in cases of felony. The sheriff is to summon a panel of a number sufficient to make a jury of twelve, and also to exhaust all the peremptory challenges that the State and the defendant are both entitled to. The defendant is entitled to a list, a reasonable time before the formation of the jury is commenced [65] The names are to be put in some receptacle, and drawn out one at a time by a child under ten years of age, or by the judge, or by some person agreed on by the Attorney-General and the defendant [66] When one is drawn, he con-

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63. Shan Code, § 7159
64 1 Colo 344, 3 Heisk 230
65 Shan. Code, § 7181.
66 Shan Code, § 7182

stitutes one of the jury unless he is challenged, either for cause or peremptorily.

There is in cases of felony an implied challenge of every juror, for certain causes; and he is at once sworn and interrogated as to the existence of those causes. The questions asked him are. 1 Are you a householder or freeholder in this county? 2 Are you related to the prosecutor A., or the defendant B? 3 Have you formed or expressed an opinion as to the guilt or innocence of the defendant? These three questions indicate the three grounds of implied challenge. The defendant is, of course, not excluded from challenging the juror upon any other ground, or having any other questions put to him to test his eligibility. Under circumstances, to be judged of by the court, extraordinary and unusual questions may be propounded, in order to secure an unexceptionable jury [67]

When a juror is ascertained to be competent, the clerk first asks the Attorney-General if he will take him. If he passes him, the same question is put to the defendant. If he accepts him, he takes his seat in the jury-box. But either one of them may challenge a given number peremptorily. In misdemeanors, the State and the defendant have each five peremptory challenges In felonies, not capital, the State has four for each defendant, and each defendant ten, in capital cases, the State has six for each defendant, and each defendant has twenty-four [68]

When twelve unexceptionable jurors are selected, they are to be sworn by the clerk. The form of oath may be the same as that given in civil cases.

PRESENTING THE CASE TO THE JURY.

The Attorney-General first reads the indictment. If any special pleas are to be tried, they are to be read as in

67 6 Humphr 249. 68 Shan Code, §§ 5825, 5826

civil cases If the plea of not guilty is the only one, it may be read by the clerk from his record. It is usual, however, simply to announce to the jury that the defendant pleads not guilty. The State's attorney then calls his witnesses and has them sworn, and if the rule is not demanded, he proceeds to examine them, and when he is through, the defendant has his sworn and examined. It is a matter of course to put the witnesses under the rule in felonies, and then they are all introduced and sworn, on both sides, and committed to some officer sworn to keep them separate and apart from all other persons. The objections to the competency of witnesses and the admissibility of evidence, and the mode of examination, are substantially the same as in a civil suit

ARGUMENT. CHARGE. MISTRIAL.

The State's attorney has the opening and concluding argument. If he has associate counsel, he may assign to them what place he chooses in the argument. When the argument is closed, the court charges the jury. In felony cases the judge is required to reduce every word of his charge to writing and read it to the jury from the writing, and file it with the papers The jury shall take the charge with them when they retire to consider of their verdict.(*a*)

The jury retire, always in care of an officer sworn, in felonies, to keep them together, and separate from other persons, during their deliberations. They may, by consent, be allowed to separate during the adjournment of the court, in cases of misdemeanor, but not in cases of felony [69]

If the jury cannot agree, they must, nevertheless, be kept together until it becomes a matter of evident necessity to discharge them, unless the defendant consents to

(*a*) Shan Code, § 7186. 69 1 Swan, 256

their discharge.[70] That necessity exists 1. When the court is obliged to adjourn. 2. Where the defendant is providentially disabled to attend the trial. 3. Where, by his own misbehavior, he obtains an unfair advantage of the State, and thereby renders it impossible for the jury to investigate the case correctly. 4 Where it becomes physically impossible for the jury to agree; a moral impossibility, such as merely not being able to bring their minds to unanimity, is not sufficient ground for discharging them.[71] When the jury is discharged, the defendant may be again tried at the same, or the next term.[72]

VERDICT.

What is said about the verdict in the history of a civil suit is applicable to the verdict in a criminal case. It may be general or special. But it requires a more decided preponderance of evidence against the defendant to warrant a verdict of guilty, it must be preponderating enough, in felonies at least, to remove all reasonable doubt.

Where there are more defendants than one, and the jury cannot agree as to all, they may render their verdict as to those in regard to whom they agree, and judgment shall be pronounced against them.[73] If the indictment is for an offense of degrees, they may find the defendant guilty of any of the degrees Thus, upon an indictment for murder, the defendant may be found guilty of murder in the first or second degree, or manslaughter. He may also be found guilty of any offense, the commission of which is necessarily included in that which is charged, whether it be a felony or misdemeanor. As malicious stabbing or shooting necessarily includes an assault and battery, as an assault with intent to kill, or commit any other felony,

70 1 Humphr 102
71 10 Yerg 532, 3 Humphr 70.
72 Shan Code, § 7194
73 Shan Code, § 7193

necessarily includes an assault, the defendant charged with these higher offenses may be found guilty of the lower [74]

The conviction of an inferior degree operates as an acquittal of all higher degrees included in the indictment [75]

If there is a good and a bad count in the indictment, a general verdict of guilty will be sustained, and judgment rendered on the good count [76]

In misdemeanors, the jury generally do no more than find the defendant guilty, or not guilty, leaving it to the court to assess the punishment. If, however, they think there ought to be a heavier fine than fifty dollars inflicted, they have to assess it; for the court cannot inflict a higher fine than fifty dollars.[77] If it is an indictment for murder, they have to find the degree of homicide If they find it murder in the first degree, they have only to say so, unless they find also mitigating circumstances.[78] If it is a penitentiary offense, they must find the period of imprisonment, within the limits prescribed by statute.[79]

PRESENCE OF DEFENDANT.

In cases of felony, the defendant must be present when the verdict is rendered, when the evidence is given, when the jury is impaneled, and, in fact, during the whole trial The presence of the defendant is not essential to the validity of the proceedings in misdemeanor cases.

JUDGMENT.

Judgment follows the verdict as a matter of course, unless it is suspended by a motion for a new trial, or in arrest of judgment. If the defendant is found not guilty,

74 Shan Code, §§ 7195–7197 75 7 Pickle, 728, 2 Lea, 615
76 Shan Code, § 7190
77 Shan Code, § 7212, Const Tenn, art 6, § 14
78 Shan Code, §§ 6441, 7231 79 Shan Code, §§ 7202, 7213.

the judgment is that he be acquitted and discharged. If he is found guilty, the court pronounces the judgment prescribed by law. In some cases the punishment is limited by statute to fine alone Where there is no statutory limitation, fine alone, or fine and imprisonment, at the discretion of the court, is the common-law punishment for misdemeanors, the fine not to exceed fifty dollars, unless it is assessed by the jury If the defendant is fined, and does not at once pay the fine and costs, or give security for them, he is committed to jail until they are paid

If a defendant is found guilty of murder in the first degree, he is asked if he has anything to say why judgment of death should not be pronounced upon him, and if he says nothing sufficient to arrest the judgment, sentence is pronounced that he be hung by the neck until he is dead, at such time as the court may designate. If, however, the jury find mitigating circumstances in the case, the court may either sentence the defendant to be hung, or to be imprisoned for life in the penitentiary.

Upon the verdict in a penitentiary case, the judgment is that the defendant be imprisoned in the penitentiary for the period assessed by the jury. Infamy is a part of the judgment for certain offenses mentioned in the Codes Disqualification for office is another consequence of sentences to the penitentiary for all felonies except manslaughter. Every such sentence operates as a removal from office, and a disqualification to be executor, administrator, or guardian In prosecutions for petit larceny, and for receiving stolen goods under the value of thirty dollars, the court may, on the recommendation of the jury, substitute fine and imprisonment in the county jail in lieu of punishment in the penitentiary.[80]

It is always a part of the judgment, on conviction, that the defendant pay the costs.

80. Shan Code, §§ 6555, 7199, 7200, 7203

ENTRIES OF VERDICTS AND JUDGMENTS.

Indictment. Gaming.

State
v
John Smith

Came the Attorney-General and the defendant, and also a jury of good and lawful men, to wit, A, B, etc, who, being elected, tried, and sworn the truth to speak on the issue joined, upon their oath do say, they find the defendant guilty as charged in the indictment. Ordered therefore that the defendant be fined five dollars and pay the costs Then came James Smith and confesses judgment jointly with the defendant for the fine and costs aforesaid

Indictment. Murder.

State
v
James Hart

Came the Attorney-General and the defendant, and also a jury of good and lawful men, to wit, A, B, C, etc, who, being elected, tried, and sworn the truth to speak on the issue joined, upon their oath do say, the defendant is guilty of murder in the first degree, as charged in the indictment Ordered, that the defendant be recommitted to jail

Judgment is rarely pronounced in cases of felony until some subsequent day of the term. Time is given the defendant and his counsel to consider whether they will move for a new trial or in arrest of judgment, and to prepare themselves to sustain those motions. When sentence is pronounced, it will be entered as follows:

Indictment. Murder.

State
v
James Hart

Came again the Attorney-General and the defendant, and the defendant being asked if he had anything to say why sentence of death should not be pronounced by the court on the verdict of the jury, says nothing It is therefore adjudged by the court that, on the 1st day of May, 1903, between the hours of 12 and 2 o'clock, P M, within one mile of the courthouse in Lebanon, the sheriff of Wilson county hang the defendant by the neck until he is dead It is further ordered that the defendant pay the costs, and that he be kept in jail till the time appointed for his execution

VERDICT AND JUDGMENT IN PENITENTIARY CASE.

The entry in all cases is the same to the words, "upon their oath do say." Let us suppose the verdict is for murder in the second degree. The entry will proceed thus:

> The defendant is guilty of murder in the second degree, and that he be imprisoned in the penitentiary ten years. It is therefore adjudged by the court that the defendant be imprisoned in the penitentiary ten years, and that he pay the costs of this prosecution Ordered, that the sheriff forthwith convey the defendant to the penitentiary

If the defendant is convicted of an infamous crime, add to the judgment, after "ten years," "and that he be rendered infamous, and pay the costs of this prosecution."

NEW TRIAL AND ARREST OF JUDGMENT.

If the defendant is acquitted, the State cannot obtain a new trial. But if he is convicted, he is entitled to a new trial upon all the grounds heretofore stated as sufficient in a civil suit If it is refused, he is entitled to his bill of exceptions

The motion in arrest of judgment is made principally on account of insufficiency of the indictment. But it may be made upon any substantial error in any part of the record. Many of these, however, are waived by pleading not guilty And many more of them are cut off by the Code of Tennessee.[81] It provides that no new trial, or motion in arrest, or reversal of the judgment in the Supreme Court, shall be had for an omission to enter the defendant's plea of record, or to mark a prosecutor on the indictment, or to show there was one, a defect or absence of a caption, to enter the indictment returned by the grand jury, or to state in the bill of exceptions that the venue of the offense was proved.

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81 Shan Code, § 7217.

APPEAL TO THE SUPREME COURT.

With one exception, either the State or the defendant has a right to appeal to the Supreme Court, and that exception is, where there is a verdict of acquittal In all other cases where the decision is final, either may have an appeal in the nature of a writ of error. Either may also obtain a writ of error in the same way that it may be obtained in civil cases [82]

Upon an appeal, neither party has to give any security for costs or fine; but the defendant has to remain in jail, or give bail for his appearance at the Supreme Court to answer the indictment If he does not give bail, the court should order the sheriff to deliver him to the sheriff of the county in which the Supreme Court is held. If he is not so delivered, however, the Supreme Court will order him to be brought.

The clerk is to make out a certified transcript of the record and send it to the clerk of the Supreme Court, as in civil cases.

PROCEEDINGS IN THE SUPREME COURT.

They are the same as in civil cases If the defendant, on appeal, has given bond and surety for his appearance before the Supreme Court, and he fails to appear, a forfeiture is taken before that court

Upon an affirmance of the judgment below, the Supreme Court carries it into execution, inflicting upon the defendant the fine, imprisonment, or death, in accordance with the judgment appealed from

If the judgment below, on appeal, is reversed, the Supreme Court renders such judgment as the Circuit Court should have rendered, and if further proceedings are, in their opinion, necessary, they will remand the case and

82 Shan Code, §§ 7219–7223

take the defendant's bond for his appearance before the Circuit Court, or remand him to jail.

Upon the return of the case to the Circuit Court it resumes its place on the docket, the witnesses are to be resummoned, and the case tried as before.

EXECUTION OF SENTENCE.

Upon a sentence of death no execution issues. The judgment is the sheriff's warrant for the execution. The court appoints the day and the hour, and in Tennessee the statute designates the jail, or within its inclosure, as the place.

Nor does an execution issue to carry a sentence of imprisonment in the penitentiary into execution; but the sheriff takes a certified copy of the sentence and delivers it with the convict to the proper officer of the penitentiary, who registers it in a book kept for that purpose.

DEFINITIONS AND EXPLANATIONS

OF SOME OF THE MORE UNUSUAL WORDS AND PHRASES USED IN THIS VOLUME, ALPHABETICALLY ARRANGED

A mensa et thoro From bed and board A limited divorce

A vinculo From the bonds (*matrimonii*) of matrimony An absolute divorce

Ab initio. From the beginning

Actio personalis moritur cum persona A personal action dies with a person Thus, actions for libel and slander die with the death of either the injured or injuring person

Alias Otherwise, at another time, in another manner If a summons is returned "not to be found," an *alias* may issue. So called from the words "as we have formerly (at another time) commanded you," being inserted in the writ at its commencement

Ancillary Servant, assistant, a proceeding attendant upon, or which aids another proceeding as principal, as an *ancillary* attachment sued out in aid of a pending suit

Animus testandi With the mind, or intention of making a will

Ante Before

Arguendo In the course of arguing or argument

Assumpsit He has undertaken, he undertook The name of a common law action to recover damages for the breach of a contract not under seal

Audita querela Complaint having been heard A common law writ, now obsolete, giving the defendant relief against a judgment on matter of defense arising since the judgment. The *certiorari* to quash the execution is the substituted remedy

Bona fide In good faith, honestly, without fraud

Capias (That) you take

Capias ad satisfaciendum or *ca sa* (That) you take to satisfy A writ not much, if at all, in use in this country, for the arrest of the defendant in a civil action for debt where judgment has been rendered against him for money which has not been satisfied

Capias in withernam (That) you take again, a taking again A common-law writ in favor of the defendant in replevin, commanding the sheriff to take other goods of the plaintiff than those replevied The object being to compel the plaintiff to return the goods replevied by him to the defendant.

Certiorari To certify, to be certified of, to be informed of, to be made more certain The name of a writ issued from a superior court, directed to one of inferior jurisdiction, commanding the latter *to certify* to the former the record in the particular case The command of the writ has given to it its name

Civiliter mortuus. Civilly dead

Chose in action A thing of which one has the right but not the possession A thing recoverable by an action at law

Close This word in the law of real property signifies a piece of land It is not necessarily land inclosed by a visible fence, but the boundary may be invisible, existing only in the contemplation of the law

Cognovit actionem He has acknowledged or confessed the action A written acknowledgment or confession on the part of the defendant that he has no defense to the action brought against him, and expressly or by implication, conferring authority on the plaintiff or other person to confess judgment on the demand

Colloquium A talking together, a conversation The term used in a declaration for libel or slander, to indicate that the libelous or slanderous imputation had reference to the plaintiff

Coram nobis In our presence, before us, ourselves A writ issuing from and returnable to the Circuit Court, for the correction of errors of fact alleged to have occurred on a former trial of the cause in that court

De bene esse Concerning, well to be A technical phrase applied to certain proceedings had, which are deemed *to be well*, that is, well enough for the present, proceedings conditionally had, and in that meaning is the phrase usually accepted It is most commonly applied to testimony taken in anticipation of the time when it may be needed, and *provisionally*, that is, to be used when needed, if there be then no legal and sufficient objection interposed.

De bonis asportatis Concerning goods carried away A trespass committed by wrongfully taking and carrying away another's chattels

De bonis non Concerning (or, of) goods not (administered) If an administrator dies before finishing the administration, his successor is called *administrator de bonis non*, i e, he is to administer on that part of the estate not administered by his predecessor If such a person succeeds an executor, the words *cum testamento annexo* (with the will annexed) are added

De injuria Concerning (by reason of, on account of) the injury (or wrong)

De injuria sua propria absque tali causa Of his own wrong without such cause (or, excuse). The name of a replication commonly called *de injuria*, to a plea of justification, in which the matter of justification is traversed, as if the declaration

be for an assault and battery, and the defendant should justify the assault by saying "he assaulted and beat the plaintiff in his (the defendant's) own necessary self defense against the assault of the plaintiff," the replication *de injuria* would be, that the defendant assaulted and beat the plaintiff of his, the defendant's 'own wrong, and not for the cause alleged in defendant's plea" A more simple and direct mode of putting in issue the matter of justification would be by the general replication, to wit the plaintiff joins issue on the defendant's plea.

De novo Afresh, anew

De retorno habendo Of (or, concerning) the return to be had A common-law writ in replevin issuing in favor of the defendant for the return of the property replevied in the first instance by the plaintiff The relief is now given the defendant on judgment in his favor, by the alternative writ of execution for the property or its value in money

De vicineto. From the neighborhood or vicinity A term applied to a jury because originally they were taken from the neighborhood of the matters to be investigated or tried

Debenture Money or debt due A custom house certificate entitling the holder to a drawback of duties paid on exported or imported goods

Dedimus potestatem We gave (or, have given) the power Authority by deed, as a power of attorney.

Detinue Detaining, keeping, withholding the possession of Name of an action

Devastavit. He has wasted (the assets) An administrator or executor who has wasted the assets of the estate, is said to be guilty of a *devastavit*

Devisavit vel non He devised or not. The name of the issue in the Circuit Court on contesting a will One party affirms that the paper is the will of the deceased, the other says that it is not

Dictum See *Obiter dictum.*

Distringas That you distress, strain hard, gall, rub A writ issued to compel a party to deliver up some specific thing by taking from him or depriving him of the use of other things, or by the same means, for compelling him to do anything adjudged or ordered done by the court The party is thus distressed, vexed, annoyed, until he performs the duty required of him.

Duces tecum. That you bring with you See *Subpœna duces tecum*

Elegit. He has elected, picked, chosen, selected, pitched upon A writ of execution by which the plaintiff obtained possession of the debtor's chattels for the payment of the debt, and if they were insufficient for the purpose, it also extended the relief to taking possession of the debtor's lands, until the debt was satisfied by the rents and profits.

Eloign To remove

Ex contractu. From (or, arising out of) a contract

Ex delicto From (or, arising out of) a tort or wrong

Ex parte From one part (or, party).

Extendi facias (That) you cause to be extended (valued) A common law writ of execution, the object of which was to subject land, or the profits of lands, to the payment of debt, which was levied by the aid of commissioners, who were to go upon the land, and under oath fix a value upon it, or the profits arising from it.

Factum The deed or act of a person, anything done.

Fee simple Absolute estate in land

Feme covert A married woman

Feme sole An unmarried woman

Fiat Let it be done The order of a judge for the issuance of extraordinary process

Fieri facias or *fi fa* (That) you cause to be made Final process The execution on a judgment for money, which commands the sheriff, "that of the goods and chattels, lands, and tenements, etc, you cause to be made," etc

Forma pauperis The form (or, character) of a poor person

Forum A court

Functus officio Having discharged his duty These words are frequently used, but not with strict accuracy, in relation to process, the return day of which has passed

Garnishment A warning, or notice

Garnishee. The person warned or notified by garnishment

Habeas corpus That you have the body

Holographic Wholly written (by one's own hand) A will written by the testator is a holographic will

Idem sonans Sounding alike, having the same sound Misspelling a name is not misnomer (q v) if there be *idem sonans*, as Shakspere for Shakespeare

In pais In country By *matter in pais*, is meant matter not evidenced by deed or record Estoppel is of three kinds, by record by deed, and by matter *in pais*, i e, by facts and circumstances that may be shown in the testimony of living witnesses

In toto Altogether, in whole

Indebitatus assumpsit Being indebted, he undertook, or promised A form of declaration at common law, in which the indebtedness of the defendant was first set out, followed by an allegation that the defendant thereupon undertook or promised to pay the sum or indebtedness aforesaid

Interlocutory Speak between, intermediate, not final. Any judgment or order pronounced in a cause not final in character is said to be interlocutory, as a judgment for costs on granting a continuance

Innuendo. To hint The words in a declaration for libel or slander, which show or explain the meaning of words that are not in themselves, or on the face of them, libelous or slanderous.

Jeofail I have failed An oversight A mistake in pleading admitted The statute, commonly called the "statute of amendment and jeofail," was passed to prevent formal objections after a certain stage in the proceedings, and to allow correction or amendment of formal defects

Joinder Coupling, joining, uniting two distinct things. Joinder of counts means the uniting in the same declaration of two or more separate statements (called counts) of the same cause of action, or of distinct causes of action in the same declaration The word with appropriate prefixes is also used in relation to parties as a nonjoinder of parties, where the necessary parties are not made parties, or a misjoinder of parties, where parties are improperly united as defendants or complainants

Laches Negligence.

Liberum tenementum. Free tenement, or freehold. Where in an action for trespass to lands, the defendant relies upon the defense that the land upon which the alleged trespass was committed is his, his plea is called *liberum tenementum*, i e, the land is his freehold, or the freehold estate in the land is in him, the defendant.

Levari facias (That) you cause to be raised (levied) A writ of execution authorizing a levy upon and sale of the debtor's goods, and the sequestration of the rents and profits of lands for the payment of debt.

Mandamus We command you. A writ directed to the defendant commanding him to do a particular thing

Mesne Middle, intermediate Relating to process which is original, mesne, and final

Misnomer. A wrong name

Mittimus We send The warrant, or written authority to the jailor to receive and keep the prisoner

Molliter manus imposuit He laid hands on gently The name of a plea in an action for assault and battery, in which the defendant alleges that the battery complained of was lawful, and that "he laid hands on the defendant gently," i e, used no more force than was necessary

Nihil Nothing When used in relation to a sheriff's return of a summons, it is equivalent to "not found"

Nil debet He owes nothing The name of the general issue in an action on a contract for the payment of a definite sum of money

Nisi. Unless. A judgment *nisi* is not final, but may become so *unless* the defendant appear and show cause, as required by the court, why it should not be made so. A judgment against a witness for failing to appear is *nisi* It becomes absolute and final on *sci fa*, unless he appears and shows a good reason for his failure to appear under the subpœna.

Nisi prius. Unless before In England formerly all common-law actions were tried at Westminster. Afterward the statutes allowed causes to be tried in the counties where they arose, and the justices of assize were required to go into the counties for that purpose The sheriff was, however, required to summon the jurors to appear at Westminster (*nisi prius*) *unless before that day*, the justices of assize came into the county, and so the courts held in the counties came to be called *nisi prius* courts The meaning of the term in American law is simply the trial of a civil action on an issue of fact before a court and jury

Non assumpsit. He did not undertake or promise The name of the general issue in an action for damages for the breach of a contract

Non cepit He took not The name of the general issue at common law in an action of replevin.

Non compos mentis Not sound in mind.

Non detinet. He detains not The name of the general issue in detinue

Non obstante veredicto Notwithstanding the verdict.

Nul tiel record No such record

Nulla bona No goods

Nuncupative. Publicly declaring by word of mouth

Obiter dictum A statement by the way — in passing Applies to an opinion given by a judge incidentally, or as an illustration, and not as a part of the decision of the court, and not binding as a precedent.

Officina justitiæ Office of justice

Onus probandi Burden of proving

Ore tenus Orally, by word of mouth

Oyer The hearing, as of the reading of a note, bond, deed, etc.

Oyez Hear ye, attend, listen From this word comes the words O yes, in common use by the sheriff and other persons to attract attention in making proclamation

Panel The list of jurors

Pendente lite The suit pending, during the pendency of suit

Per patriam By the country

Petit Small, little Used in relation to the traverse or trial jury to distinguish it from the grand jury Petit larceny, petit treason, are terms indicating a low degree of these crimes.

Pluries Often The writ that issues after an *alias*, so called from the words "As we have often commanded you," etc, being inserted in the writ at its commencement.

Posse comitatus The power of the county The sheriff may, under proper circumstances, summon bystanders and even the whole people (power of the county) to assist him in the execution of process.

Post After, afterward

Prima facie On the first face, at the first view

Procedendo. By proceeding, or, by being proceeded in.

Prochein ami. Nearest, or next friend Applied to one who sues in behalf of a minor, or other person under legal disability

Pro confesso As confessed A decree in a Chancery Court, or in any court where the proceeding is conducted as in equity, in which the bill or petition is taken as true in default of answer In legal effect it is like that of a judgment by default at common law

Quantum How much, quantity, amount

Quare clausum fregit Wherefore he broke the close The words contained in a common-law writ in an action for trespass to land, the defendant being summoned to answer and show cause *why he broke the close* of the plaintiff

Quo animo With what mind

Quo warranto With or by what authority.

Quod vide, or *Q. V* Which see.

Rebutter To repel, to defeat, to take away the effect of something.

Recoupment Reducing, discounting

Rejoinder. An answer to a reply or replication

Replevin Regaining possession on security given.

Replication To answer, a reply.

Respondeat ouster. That he answer over

Rogatio testium A request of witnesses Requesting persons present to bear witness, as, of the making of a nuncupative will

Scire facias (That) you cause to know, or make known to

Sed quare But why, wherefore

Similiter In like manner A common law formula in pleading, for accepting the tender of an issue triable by a jury.

Son assault demesne His own assault

Sole. Single

Statu quo In the state in which

Stricti juris Of strict law

Sui juris. Of one's own right

Subpena or *subpœna* Under penalty.

Subpena or *subpœna duces tecum.* You will bring with you under penalty

Sur Upon As a prefix to rebutter (sur-rebutter) means a rebutter upon or to a rebutter, sur-rejoinder a rejoinder to or upon a rejoinder

Supra. Above, before

Summum jus The highest (or, extreme) law

Supersedeas That you stop The name of a writ which stops or stays a proceeding

Seizin or *Scisin* Possession, ownership It relates to estates in land, and may be the actual possession of an estate of free hold, or the mere right to the possession of it

Talesmen Such men

Teste. By witness

Terre tenant Landholder, holding the land

Traverse To deny.

Venditioni exponas That you expose to sale.

Venire To come

Venire facias That you cause to come

Venue. Neighborhood, vicinity It relates to the locality where the cause of action arose, or where the matters out of which the cause of action arises occurred, and to the county in which the action or suit may be brought

Vi et armis With force and arms

Visne An old name for the jury, because they were taken from the neighborhood or vicinity of (*de vicneto, q v*) the matters in question

Viva voce. By the living voice, oral testimony.

Voire dire Speak the truth, or speak truly Applied to the examination of a person under oath, touching his qualifications to serve as juror.

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